

# THE INFORMAL SECTOR UNDER OHADA: IMPLICATIONS FOR LAW AND DEVELOPMENT

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## ABSTRACT

This dissertation evaluates the Organization for the Harmonisation of Business Law in Africa (OHADA) in relation to the informal sector in West Africa. The paper also considers the challenges to successful legal reform arising from the interaction of African cultural and social values with imposed formal law. Means to improve links between OHADA formal laws and institutions to the realities of the majority of Africans living and operating in the informal sector are suggested. These topics are explored within a thematic context of desiring to enhance the development prospects for the people in the region.

## LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
AEC	African Economic Community
CCJA	Common Court of Justice and Arbitration
CEMAC	Central African Monetary and Economic Community
CSR	Corporate Social Responsibility
ECOWAS	Economic Community of West African States
ERUSMA	Regional Training Centre for Legal Officers
FDI	Foreign Direct Investment
ICA	International Co-operative Alliance
ILO	International Labour Organisation
JO	Journal Officiel
OCDC	U.S. Overseas Cooperative Development Council
OHADA	Organisation for the Harmonisation of Business Laws in Africa
RCCM	Registre du Commerce et du Crédit Mobilier
UA-ST	Uniform Act on Secured Transactions
UA-GCL	Uniform Act on General Commercial Law
UA-CS	Uniform Act on Cooperative Societies
UEOMA	West African Economic and Monetary Union

## INTRODUCTION

If development is seen, not as a continuing process and one where the aim is to improve the lot of the individual, but as something commanded and imposed from above, then it will engage the support of those who wield the levers of power centrally, and they will wield these levers with scant regard to the declared aims which they purport to espouse.<sup>1</sup>

Most people in Africa earn their livelihoods and obtain the goods and services they need within a social network outside the formal, regulated sectors of society. Therefore, any legal reform effort intended to foster economic development must address the realities of the informal sector. With this in mind, this dissertation evaluates the Organization for the Harmonisation of Business Law in Africa (OHADA) in relation to the informal sector in West Africa.<sup>2</sup> The fundamental question is what impact does OHADA have, or could have, on the informal sector actors and, consequently, what is OHADA's impact on the economic development of the region. For the purposes of this paper, the litmus test for effectiveness of OHADA is whether its formal laws are able to assist those living and working in the informal sector in the region. My premise is that there can be no true development in any meaningful sense of the word unless those lives are improved. This paper is also concerned with the challenge to successful legal reform arising from the interaction of African customary laws and social values with imposed formal law of foreign origin. The socially embedded informal institutions, norms, and practices in West Africa have a significant impact on legal reform and on the prospects of development in the region. In a broader sense, this paper seeks to understand what role private economic law has or could have in enhancing development and contributing to poverty alleviation.

Chapter One introduces background concepts and an analytical framework regarding the complex relationship between laws and development generally and in the African

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<sup>1</sup> Antony Allott 'Development for What? False Gods and Holy Writ' (1984) 3 *Third World Legal Stud.* 1, 5.

<sup>2</sup> The acronym is from the French: l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires. Evidence from other sub-Saharan African countries is also considered. Unless otherwise specified, Africa refers to sub-Saharan Africa.



context specifically. The concepts and issues discussed therein lay the analytical foundation for the rest of the paper. Chapter Two explores the scope and characteristics of the informal sector in Africa, including the ubiquitous informal networks and institutions extant in West Africa. A detailed description of the tontine is provided as an exemplar of an effective informal and indigenous mutual aid association. The causes of informality are beyond the scope of this paper and important gender issues are not addressed. Regardless of one's perspective concerning the role of informal institutions and their impact on commerce in the region, the reality of the informal sector must be understood and addressed before any commercial law reform can be effectuated. Chapter Three presents an overview and critique of pertinent aspects of OHADA as well of some of its foundational assumptions. The primary concern is OHADA's irrelevance to the large informal sector in the region and, consequently, the diminished prospects for development. A functional approach to laws and law reform is recommended. In Chapter Four, ways to improve links between OHADA formal laws and institutions to the realities of the informal sector are explored. Such links would benefit informal sector actors and might also improve the understanding and acceptance of OHADA laws. Two possible linkages are the addition of mediation as an alternative dispute resolution mechanism and the incorporation of stakeholder-oriented, corporate social responsibility norms into OHADA laws. Recent legislation regarding cooperatives offers the most significant opportunity to improve links between OHADA and the informal sector and to enhance the prospects of development in the region. Finally, the issue of reintegration of African societies is discussed as a way of summary.

## CHAPTER ONE – LAWS AND DEVELOPMENT

### 1.1 What is Development?

We first need a clear notion of what we mean by development: what is its purpose and whom is it for?<sup>3</sup> Development is too often defined only in terms of economic development, as growth or increase in resources or other factors.<sup>4</sup> Growth itself is not economic development, and economic development, although necessary, is not sufficient for development to occur. It is possible to have growth without development. An increase in gross domestic product or national income, for instance, is not alone useful measures of development. Development is a continuing improvement in the interrelated economic, social, and political conditions and institutions in a state which enables or allows for the individual capability of its citizens. This definition reflects the ‘human capability’ concept of Amartya Sen and Martha Nussbaum, for whom the concept of development is most fundamentally about ‘the achievement of a better life’ for human beings.<sup>5</sup> Development is the enhancement of certain human ‘functionings’ and the expansion of human capabilities to so function.<sup>6</sup> Economic growth, however measured, is but a means for other things concerning human ‘well-being.’<sup>7</sup> Under this view all countries are developing ones.<sup>8</sup> Economic development is ultimately about the effective freedoms and capabilities that people have in the economic sphere, in particular to have basic economic needs fulfilled.<sup>9</sup> Economic development must also be sustainable. Sustainable economic growth requires that a country have inclusive political and

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<sup>3</sup> Allott op cit (n1) 2, 4.

<sup>4</sup> Ibid.

<sup>5</sup> David A Crocker ‘Functioning and Capability: The Foundation of Sen’s and Nussbaum’s Development Ethic’ (1992) 20 (4) *Political Theory* 584 at 585.

<sup>6</sup> Ibid at 587.

<sup>7</sup> Ibid.

<sup>8</sup> Allott op cit (n1) 4.

<sup>9</sup> Amartya Sen ‘What is the Role of Legal and Judicial Reform in the Development Process’ (2006) in *World Bank Legal Review, Vol 2: Law, Equity, and Development* 33, 39.

economic institutions.<sup>10</sup> Fundamental to the creation or enhancement of inclusive institutions is the existence of a pluralistic society wherein competing interests and values have a voice.<sup>11</sup> Ultimately development is what people in a given society want and the meaning they give to it. Since this paper addresses the relationship between commercial laws and economic activities, it is most directly concerned with economic development, but with a view towards development in its deeper sense as outlined above.

## 1.2 Rule of Law and Legal Pluralism

### 1.2.1 Rule of Law

‘The “rule of law” is an ideal that does not mean any single thing.’<sup>12</sup> While there is agreement on the necessity of the rule of law, there is no agreement on its essential characteristics.<sup>13</sup> In a minimalist conception, the rule of law means that all citizens and government officials and agents are bound, and generally abide, by enforceable rules.<sup>14</sup> The rule of law also requires at least some basic level of personal and civic safety and security. More expansive concepts of the rule of law expect governing institutions, including the formal legal system, to bring about various desired objectives, such as stability, predictability, transparency, accountability, and even democracy. Most rule of law projects focus on institutional reform of the judicial system as a means to bring about those objectives. Many rule of law projects promote market liberalism, with emphasis placed on the enforcement of private property rights and contracts, operating under the presumption that the rule law is an instrument of economic development. (OHADA is an example of such a rule of law project, as will be shown in Chapter 3.)

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<sup>10</sup> Daron Acemoglu and James A Robinson *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (2012) 79-95, 429-31.

<sup>11</sup> Ibid.

<sup>12</sup> Brian Z Tamanaha ‘The Primacy of Society and the Failures of Law and Development’ (2011) 44 *Cornell Int’l L.J.* 209 at 245.

<sup>13</sup> H Patrick Glenn ‘Sustainable Diversity in Law’ (2011) 3 *HJRL* 39 at 44.

<sup>14</sup> Brian Z Tamanaha ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3 *HJRL* 1 at 2.

Rule of law projects are implicitly informed by the unstated assumption that law will (and must) be consolidated within the state.<sup>15</sup> The current rule of law theory is largely fixated on formal institutions, and the projects are often disconnected to the actual results of their implementation.<sup>16</sup> Rule of law reforms also ignore the majority of Africans living in accordance with customary laws under traditional authority.<sup>17</sup> For Sen, any conception of the rule of law must consider peoples' substantive freedom to exercise their rights and entitlements, and not only legislation and formal laws.<sup>18</sup> Vanderlinden reminds us, justice is a dominant value implied in anything legal and law should foster social justice.<sup>19</sup> Most contemporary legal theory also presumes an underlying problem of conflict and a need for uniformity, with the rule of law as means of conflict resolution.<sup>20</sup> However, it is not clear that a multiplicity of laws and the contact of legal orders must generate conflict.<sup>21</sup> In many instances there is 'not a conflict so much as a search for accommodation.'<sup>22</sup> Because the rule of law has become a 'contested concept,' Glenn suggests replacing it with the 'rule of laws.'<sup>23</sup> A rule of laws approach, however, requires 'active support of the means of the conciliation' among these laws.<sup>24</sup> The conciliation

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<sup>15</sup> Tamanaha 'Rule of Law' op cit (n14) 14.

<sup>16</sup> Glenn op cit (n13) 45.

<sup>17</sup> Joseph M Isanga 'Rethinking the Rule of Law as Antidote to African Development Challenges' in David K Linnan (ed) *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (2012) 60.

<sup>18</sup> Sen op cit (n9) 39.

<sup>19</sup> Jacques Vanderlinden 'What Kind of Law Making in a Global World? The Case of Africa' (2007) 67 *La. L. Rev.* 1043 at 1045, 1047.

<sup>20</sup> Glenn op cit (n13) 53.

<sup>21</sup> Ibid. For instance, there was little confusion and no perceived conflict in English legal history until the emergence of the nation state from the seventeenth century. Multiple laws co-existed in non-conflictual relationships, even within the same territory.

<sup>22</sup> Ibid at 54.

<sup>23</sup> Glenn op cit (n13) 56.

<sup>24</sup> Ibid.

among laws in Africa is critical, since the ‘conciliation of laws may well provide a major means of conciliation of peoples.’<sup>25</sup>

### 1.2.2 Legal Pluralism

The term legal pluralism describes the situation in which a population observes more than one body of law and the phenomenon of law beyond the state.<sup>26</sup> Multiple normative orders exist within every society, including (contemporary) traditional or customary systems.<sup>27</sup> Legal pluralism is a prominent feature in African states, and has increased with continuing globalisation.<sup>28</sup> A pluralist view of law requires one to distinguish between law and laws – between a single global law and a plurality of laws.<sup>29</sup> Legal pluralism itself is neither a solution nor a problem, but is rather the empirical fact or default position of African legal systems.<sup>30</sup> Rule of law reforms often increase legal pluralism.<sup>31</sup> Land titling projects, for example, create a situation where people are confronted with two competing legal systems: state law granting individual, freehold ownership and customary laws granting communal rights.<sup>32</sup>

According to Glenn, since non-state law can never be eliminated, diversity of laws is inevitable and should be seen as sustainable.<sup>33</sup> Sustaining the diversity of laws requires abandoning the presumption that law is defined in terms of state law, and it also requires that the law of the state be ‘normatively justified in local circumstance.’<sup>34</sup> The idea of sustainable diversity in law, however, is incompatible with the most conceptions

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<sup>25</sup> Glenn op cit (n13) 53.

<sup>26</sup> Ibid at 46.

<sup>27</sup> Tamanaha ‘Rule of Law’ op cit (n14) 5, 7.

<sup>28</sup> Ibid at 9.

<sup>29</sup> Vanderlinden op cit (n19) 1058

<sup>30</sup> Glenn op cit (n13) 46-47.

<sup>31</sup> Tamanaha ‘Rule of Law’ op cit n14) 11

<sup>32</sup> Ibid.

<sup>33</sup> Glenn op cit (n13) 47-48.

<sup>34</sup> Ibid at 50.

of the rule of law.<sup>35</sup> Effective law reform needs to recognise and pay attention to all the ‘legal formants’ in a legal system and to identify the scope of each.<sup>36</sup> Legal formants are all the elements that constitute the living law of a people or a state, which may or may not be in harmony (and may diverge) with each other.<sup>37</sup>

### 1.3. Economic Development and Legal Reform

Although a positive correlation between the rule of law and economic development has been demonstrated, serious doubts exist as to which specific factors in a rule of law measure account for this correlation and there are unresolved questions about causality.<sup>38</sup> The interrelationships between an economic system and the legal system are extremely complex.<sup>39</sup> The importance of law and legal institutions for economic growth is generally accepted, but broader research is needed on the nature of institutions and laws that promote growth.<sup>40</sup> The optimal legal rules depend upon the underlying economic situation, and the legal and judicial system need to be flexible in order to adopt those rules to an evolving economy.<sup>41</sup> Many different types of legal systems can satisfy economic needs and selected improvements in economic performance can be made without a comprehensive legal system.<sup>42</sup> Informal norms and institutions often supplement and even supplant formal law in the facilitation of business transactions.<sup>43</sup>

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<sup>35</sup> Glenn op cit (n13) 53.

<sup>36</sup> Rudolfo Sacco ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *Am. J. Comp. L.* 1 at 22.

<sup>37</sup> Ibid at 27, 30.

<sup>38</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 227-29.

<sup>39</sup> RH Coase *The Firm, the Market, and the Law* (1988) 28.

<sup>40</sup> Frank B Cross ‘Law and Economic Growth’ (2002) 80 *Texas Law Review* 1737 at 1743, 1774-75.

<sup>41</sup> Ibid at 1771-72 (‘more law is not necessarily better than less law’).

<sup>42</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 230-31.

<sup>43</sup> Kerry Rittich ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social’ in David M Trubeck and Alvaros Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) 224.

### 1.3.1 Assumptions

We must be cautious about our assumptions about the role of law in development and must remain aware of the background norms and culture that influence the efficacy of formal laws.<sup>44</sup> ‘There is a great deal of evidence suggesting that an efficient judiciary and clearly defined property rights are often of limited relevance to entrepreneurs in developing countries.’<sup>45</sup> Many of the assumptions underlying development programs have remained practically untested in the African context.<sup>46</sup> There are good reasons, for instance, to doubt that contract enforcement institutions play the central role attributed to them by law and development experts.<sup>47</sup> Local, informal institutions can often substitute for formal, third-party contract enforcement.<sup>48</sup> And while property rights might be important for economic growth, the substantive nature of those rights is critical.<sup>49</sup> There are different bundles of legal entitlements associated with property rights in different societies.<sup>50</sup> The meaning and consequence of real (immovable) property ownership prevalent in African society are very different from countries where freehold or fee simple ownership is the norm. In many African communities, members possess differing rights to use land in various capacities.<sup>51</sup> Because these customary rights are not recognised by ‘standard’ legal titles, the process of titling can extinguish them, and, if

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<sup>44</sup> David Kennedy ‘Laws and Developments’ in John Hatchard and Amanda Perry-Kessaris (eds) *Law and Development: Facing Complexity in the 21<sup>st</sup> Century* (2010) 20. (‘Many ideas about law expect the legal order to perform feats we know it can rarely accomplish.’)

<sup>45</sup> Kevin E Davis and Michael J Trebilcock ‘The Relationship between Law and Development: Optimists versus Skeptics’ (2008) 56 *Am. J. Comp. L.* 895 at 936.

<sup>46</sup> Julie Paquin *Legal Reforms and Business Contracts in Developing Countries: Trust, Culture, and Law in Dakar* (2012) 4.

<sup>47</sup> Ibid at 126. (Findings based on qualitative data gathered from extensive interviews with 30 micro-operators in Dakar, focused on their contracting practices and dispute resolution preferences.)

<sup>48</sup> Glenn op cit (n13) 56.

<sup>49</sup> Cross op cit (n40) 1771. (One cannot even generally say that more or stronger property rights are better than fewer or weaker property rights. Moreover, titling ownership in real property has not always been economically beneficial. Id at 1771-72.)

<sup>50</sup> Ibid at 1743.

<sup>51</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 239-40.

used as collateral, land will be lost and re-distributed when loans are not duly paid.<sup>52</sup> Since community life is anchored to, and revolves around, the land, dispossession upends the social life of the community; members can lose their homes, livelihoods, and possibly even food source.<sup>53</sup> Standard land titling can also enable traditional leaders to register and sell or borrow against property, and thereby possibly dispossessing members of the community and altering access to and the distribution of land in ways that were not possible under customary systems.<sup>54</sup> In addition, when reduced to a single titled owner, ownership rights often favour men to the detriment of women.<sup>55</sup>

### 1.3.2 Choices

An idea of what is intended by development must be specific to the prevailing market conditions and institutional and cultural settings.<sup>56</sup> Development policy needs to be grounded in an understanding about how particular political and economic ‘distributive choices’ will put resources into the hands of those whose return on their use will cause development to occur.<sup>57</sup> Without knowing what could be achieved with alternative institutional arrangements, it is impossible to choose sensibly among them.<sup>58</sup> And while a legal regime can offer an arena to view and contest distributive choices, it cannot substitute for them.<sup>59</sup> As a development strategy, the rule of law offers the ‘false promise’ that it can substitute for all these difficult, normative political and economic choices.<sup>60</sup>

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<sup>52</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 239-40.

<sup>53</sup> Ibid.

<sup>54</sup> Tamanaha ‘Rule of Law’ op cit (n14) 11.

<sup>55</sup> Ibid.

<sup>56</sup> Kennedy ‘Laws and Developments’ op cit (n44) 18, 21.

<sup>57</sup> Ibid.

<sup>58</sup> Coase op cit (n39) 30.

<sup>59</sup> David Kennedy ‘Political Choices’ in David M Trubeck and Alvaros Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) 169.

<sup>60</sup> Kennedy ‘Political Choices’ op cit (n59) 168; Kennedy ‘Laws and Developments’ op cit (n44) 19.



### 1.3.3 Demand for Law

A more complete understanding of the relationship between law and economic activity must also account for the demand for law, and not only its supply.<sup>61</sup> ‘The significance and effectiveness of legal reforms depends almost entirely on whether local constituencies demand it.’<sup>62</sup> A legal system must serve the needs of its people if it is to gain the requisite respect and support. The specific result also depends on which constituencies are demanding the law or in control of the reform process, who most often are the political or legal elites rather than the broader population. Most rule of law initiatives are also dominated by the agendas of the promoters on the delivery or supply side.<sup>63</sup> The demand for law and the ability to voice that demand is significantly affected by the organization and functions of the legal system, a point we will return to (infra 4.3).<sup>64</sup>

## 1.4 Law and Development

The phrase ‘law and development’ is used when the objective in rule of law reform is explicitly about improving economic development in less developed economies and where ‘the development of law is promoted as a means to achieve the economic development end.’<sup>65</sup> Law and development projects are always presented as being *for* the benefit of recipient countries and their people, but they are rarely *by* or *of* those countries or people.<sup>66</sup> Efforts at law and development have failed to promote economic development and, moreover, there is no consensus on how to bring about development.<sup>67</sup> The failure of the developmental legal theories in Africa runs parallel to the increasing

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<sup>61</sup> Milhaupt, Curtis J ‘Beyond Legal Origin: Rethinking Law’s Relationship to the Economy – Implications for Policy’ (2009) 57 *Am. J. Comp. L.* 831 at 839.

<sup>62</sup> Ibid at 843.

<sup>63</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 220, 244.

<sup>64</sup> Milhaupt op cit (n61) 839.

<sup>65</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 225.

<sup>66</sup> Ibid at 243.

<sup>67</sup> Kennedy ‘Laws and Development’ op cit (n44) 19.

underdevelopment of the countries involved.<sup>68</sup> The failures appear to be conceptual, and not from the lack of talent or money.<sup>69</sup>

There is an unsettling lack of consensus about the role of law in development and unresolved uncertainty about the validity of basic assumptions underlying efforts to promote legal reform. Under these circumstances there is a distinct possibility that not only will legal reform not have any positive impact on development but that the resources invested in legal reform might have been deployed in some other fashion that would have a greater impact on development.<sup>70</sup>

Therefore, the label ‘law and development’ is misleading and will be disappointing if it suggests that law in and of itself has a special ability to deliver desired development goals.<sup>71</sup>

Notwithstanding the failures of law and development, legal development continues. Legal development, however, is not about developing the rule of law as such, but rather it is about getting legal institutions to adequately address basic legal needs.<sup>72</sup> Legal development must be seen as a constitutive part of the development process, and not merely as a means to some other the end.<sup>73</sup> Law and development doctrine has evolved since the mid-1990s, and now acknowledges (at least rhetorically) the importance of existing local institutions and conditions and also recognises the social, structural, and human dimensions of development.<sup>74</sup> Previous law and development movements paid little or no attention to customary laws and other informal legal institutions.<sup>75</sup> This new paradigm offers a more ‘holistic’ view of development where the ‘constitutive

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<sup>68</sup> Vanderlinden op cit (n19) 1052.

<sup>69</sup> Glenn op cit (n13) 40.

<sup>70</sup> Davis & Trebilcock op cit (n45) 937.

<sup>71</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 247.

<sup>72</sup> Ibid at 244.

<sup>73</sup> Sen op cit (n9) 40.

<sup>74</sup> David M Trubek and Alvaros Santos ‘Introduction: The Third Moment in Law and Development and the Emergence of a New Critical Practice’ in David M Trubek and Alvaros Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) 9.

<sup>75</sup> Davis & Trebilcock op cit (n45) 916.

dimensions (economic, social, political, and legal) are viewed interdependently.<sup>76</sup> There is also an emphasis on consensus building and increasing participation of all stakeholders that was missing in previous doctrinal ‘moments.’<sup>77</sup> Nevertheless, the justification for formal law remains centred on its presumed role in attracting investment and promoting growth.<sup>78</sup> As will be seen in Chapter 3, it appears that OHADA reforms were conceptualised under the sway of older, now discredited, law and development ideology.

## 1.5 Aspects of Law Reform

### 1.5.1 Interconnectedness of Law

Law (its qualities, character, and consequences) is connected to and influenced by every aspect of the surrounding society, and thus the legal system in every society is unique.<sup>79</sup> Accordingly, the following maxims should be kept in mind when promoting legal reform: (1) there can be no standard formula for the law; (2) a good law in one location may have negative effects or be dysfunctional elsewhere; and (3) it is hazardous to extrapolate experiences from one situation to the next.<sup>80</sup> The interconnectedness of law also means we must be cautious about destroying existing institutions, social networks, and economic patterns.<sup>81</sup>

### 1.5.2 Standardisation of Law

The standardisation (or unification) of law is expected to accelerate the ‘process of legal convergence’ – the supposed benefits of which are the reduction of transaction costs for transnational investors and the improved quality of domestic legal institutions.<sup>82</sup> The

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<sup>76</sup> Trubek & Santos op cit (n74) 12.

<sup>77</sup> Ibid.

<sup>78</sup> Rittich op cit (n43) 203, 224.

<sup>79</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 214, 219.

<sup>80</sup> Ibid at 219, 222, 232.

<sup>81</sup> Kennedy ‘Political Choices’ op cit (n59) 154.

<sup>82</sup> Katharina Pistor ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) *50 Am. J. Comp. L.* 97. (Standardisation considered by the author involves non-binding international laws and rules of corporate governance and finance. The term ‘standards’ refers to the specificity of legal rules.)

underlying premise is that well-designed legal standards once adopted by domestic governments will change the behaviour of individuals and entities and thereby influence the path of future economic development.<sup>83</sup> According to Pistor, the quest for standardisation ignores a central feature of successful economic development, which is the ‘constant change, innovation, and adaptation of institutions and organizations in a competitive environment.’<sup>84</sup> Standardisation may, in fact, undermine the development of effective legal systems due to the interdependence of legal rules and concepts and the fact that law is a ‘cognitive institution.’<sup>85</sup> The interdependence of legal rules means that most rules are not freestanding and can only be understood and applied with reference to other legal rules which either must already exist or must be created.<sup>86</sup> ‘Without ensuring complementarities between the new law and pre-existing legal institutions, harmonisation (sic) may distort rather than improve the domestic legal framework.’<sup>87</sup> The notion that law is a cognitive institution means that for law to be effective, it must be fully understood and embraced by all those who are subject to, use, or enforce the law (its constituents).<sup>88</sup> The external supply of standardised or uniform law ‘sterilises the process of law-making from political and socioeconomic development’ and ‘thereby distances it from the process of continuous adaption and innovation.’<sup>89</sup> Standardisation reduces the choices for domestic lawmakers in developing their own legal solutions, which might be a better fit for the problems they face or for the institutional capacities they have.<sup>90</sup>

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Although not identical concepts or activities, legal standardisation and legal unification are similar enough in method and affect to treat them as equivalent for expositional purposes.

<sup>83</sup> Pistor op cit (n82) 112. The adoption of a law, moreover, is not a guarantee that it will affect behaviour, or that it will affect behaviour in the intended fashion.

<sup>84</sup> Ibid at 98.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid at 106.

### 1.5.3 Legal Transplantation

Wholesale, ethnocentric legal transplantations fail because: (1) they are not accessible to the majority of people; (2) they are not adapted to prevailing legal and economic circumstances and cultures; (3) they are grafted onto legal systems that suffer from systemic problems; or (4) they lack sufficient resources and local stakeholders committed to the success of the law.<sup>91</sup> Law reform poses a particular challenge for external initiatives because the ‘social embeddedness’ of law can be nearly imperceptible from the outside.<sup>92</sup> The fact that most legal rules can be understood only in the context of a given legal order is a serious constraint for legal transplantation, because the meaning of legal statements is a function of social norms, not of the speaker’s intention.<sup>93</sup> The import of foreign concepts thought of as global concepts can aggravate the existing circumstances that were sought to be remedied.<sup>94</sup>

### 1.5 Institutional Perspective

An institutional perspective on development has become increasingly prominent. Institutions are any form of ‘constraint’ that humans devise to shape human interaction.<sup>95</sup> For purposes of this paper, institutions are those organisations or entities (formal and informal) in a society that are responsible for making, administering, enforcing, or adjudicating its laws and policies. Their major role is to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction in everyday life.<sup>96</sup> For North, institutions, and the incentives they create, are the underlying determinant of the long-run performance of economies.<sup>97</sup> Although this theory is now the

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<sup>91</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 225.

<sup>92</sup> Ibid at 231, 243.

<sup>93</sup> Pistor op cit (n82) 111, quoting Cass Sunstein ‘On the Expressive Function of Law’ (1996) 144 U. Pa. L. Rev. 2021 at 2050.

<sup>94</sup> Vanderlinden op cit (n19) 1052.

<sup>95</sup> Douglass C North *Institutions, Institutional Change and Economic Performance* (1990) 4.

<sup>96</sup> North op cit (n95) 6, 25.

<sup>97</sup> Ibid at 107, 135.

consensus, more knowledge is needed about the specific channels through which institutions affect growth.<sup>98</sup> There is less consensus about which legal institutions are important and about how to improve legal institutional quality.<sup>99</sup> Because informal institutions are embodied in customs, tradition, and codes of conduct, they are not susceptible to deliberate efforts at reform or to changes in the formal rules.<sup>100</sup> The resulting tension between altered formal rules and the persisting informal institutions has important implications for the way law and economies change.<sup>101</sup> Therefore, legal reform must operate within a complex set of ‘context-dependent particularities (economic, political, social, and cultural)’ which affect the nature and scope of feasible institutional reforms.<sup>102</sup>

### 1.6.1 Path Dependence

The centrality of path dependence is a key consideration in determining how to change dysfunctional or ineffective institutions.<sup>103</sup> Path dependence theory describes how over time the reinforcement of a given set arrangements or way of doing things (a path) raises the cost, and thus difficulty, of changing that path.<sup>104</sup> This is true even if the current path is inefficient and generates sub-optimal outcomes. As more and more people invest in a given path, these investments (time, money, skills, expectations) add up and the relative costs of exploring alternatives (switching costs) steadily rise.<sup>105</sup> Moreover, switching

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<sup>98</sup> Davis & Trebilcock op cit (n45) 944.

<sup>99</sup> Ibid.

<sup>100</sup> North op cit (n95) 45.

<sup>101</sup> Ibid.

<sup>102</sup> Mariana Prado and Michael Trebilcock ‘Path Dependence, Development, and the Dynamics of Institutional Reform’ (2009) 59 *U. Toronto L.J.* 341 at 350.

<sup>103</sup> Ibid at 342.

<sup>104</sup> Ibid at 350.

<sup>105</sup> Ibid at 351. Feedback effects and switching costs generate reinforcement, or increasing returns. The key insight associated with path dependence theory is that economic and other activities may be subject to increasing returns, whereby the benefits of engaging in them increase, rather than decrease over time.

costs also may reflect deeply embedded cultural practices that are resistant to change.<sup>106</sup> Although path dependence theory is not deterministic, it does mean that institutional change will be only incremental and will occur at the margins.<sup>107</sup> Therefore, ‘ambitious, across-the-board legal reforms carry a significantly greater risk of failure than more modest or incremental reforms.’<sup>108</sup>

## 1.7 Customary Law Considerations

Customary laws continue to regulate nearly every facet of life of Africans who live outside the formal structures of the state.<sup>109</sup> State law in Africa generally has only a limited impact on many people’s lives.<sup>110</sup> Customary institutions are deeply entrenched sources of norms of solidarity and community and represent legitimacy to Africans.<sup>111</sup> They might either undermine or supplant formal legal norms and legal institutions.<sup>112</sup> Therefore, it is important to understand and give due consideration to customary or traditional institutions and their influence on legal reform and development.<sup>113</sup> Titling land, for instance, is a complex and monumental task in Africa that cannot be equitably or efficiently accomplished without first understanding and addressing traditional rights and obligations related to land tenure. Moreover, ‘reforms that adapt traditional institutions may mitigate problems of cultural dissonance.’<sup>114</sup>

### 1.6.1 African Customary Law

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<sup>106</sup> Prado & Trebilcock op cit (n102) 370.

<sup>107</sup> Ibid at 358, 367

<sup>108</sup> Ibid at 377.

<sup>109</sup> Isanga op cit (n17) 70.

<sup>110</sup> Gordon R. Woodman ‘A Survey of Customary Laws in Africa in Search of Lessons for the Future’ in Jeanmarie Fenrich, Paolo Galizzi and Tracy E. Higgins (eds) *The Future of African Customary Law* (2011) 29.

<sup>111</sup> Isanga op cit (n17) 71-72.

<sup>112</sup> Davis & Trebilcock op cit (n45) 932.

<sup>113</sup> For a detailed analysis of the interaction between customary law and formal commercial law in Africa, see Salvatore Mancuso ‘African Law in Action’ (2014) 58 *Journal of African Law* 1.

<sup>114</sup> Prado & Trebilcock op cit (n102) 371.

Customary law is generally defined as a ‘normative order (or a body of interrelated norms, rules or principles) observed by a population, having been formed by regular social behaviour and the development of an accompanying sense of obligation.’<sup>115</sup>

Regarding this definition, however, Glenn offers some caution:

The process of transformation of unwritten law into what is known as ‘custom’ was a long and difficult process, inextricably linked to the emergence of state law. The process eventually gave rise to a definition of custom which reduced it to repetitive *practice*, even under a present sense obligation. Custom thus became what certain people *do*, in an observable manner, and law was thus reduced to observable fact, stripped of normative force. The requirement of a sense of obligation on the part of participants is also mere fact, since what is required is its existence and not any justifiable reason for the sense of obligation. Custom in its western sense thus becomes not the normative teaching of a past which continues to live and persuade, but present, observable reaction to whatever may be remembered of it.<sup>116</sup>

Customary laws are ‘inextricable parts of the local, indigenous cultures that form the basis of members’ identities, but have varying degrees of mandatory force’ and are subject to constant change.<sup>117</sup> They coexist with state laws throughout Africa, and they continue to be generally observed, whether or not they are in accord with state laws.<sup>118</sup> Customary laws are deeply rooted beliefs which are not just rules but entire ways of life.<sup>119</sup> Although there is no single system of African customary law, there is sufficient similarity among systems to treat African customary law as a coherent unit.<sup>120</sup> Allott identifies several ‘postulates of African law’: (1) everyone belongs by nature to a variety of human communities – territorial and familial; (2) membership gives individuals the right to draw on the resources of the community, but with a countervailing obligation to respect the underlying and continuing (paramount) needs of the rest of the community;

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<sup>115</sup> Woodman op cit (n110) 10.

<sup>116</sup> Glenn op cit (n13) 42-43.

<sup>117</sup> Woodman op cit (n110) 13.

<sup>118</sup> Ibid at 20-21.

<sup>119</sup> Glenn op cit (n13) 49.

<sup>120</sup> AN Allott ‘African Law’ in J Duncan and M Derrett (ed) *An Introduction to Legal Systems* (1968) 150-52.



(3) an individual is entitled to the fruits of his own labour; and (4) disputes must be resolved in such a way that the future harmony of the community is restored.<sup>121</sup>

Everyone living under customary law belongs to a kinship or family group, but there is considerable variation in the size and composition of the group and in the degree of collective action which such a group undertakes.<sup>122</sup> While African customary laws don't contain modern legal conceptions of juristic personality, the notion of 'joint-ness' in customary groups is strong and they often function as corporate legal entities.<sup>123</sup> Although African laws historically emphasised group and community rights and powers, individuals were always accorded legal capacity to hold interest in property, to negotiate with each other, and to appear as principals in litigation.<sup>124</sup> There is no general theory of obligations or modern sense of contracts under African customary law.<sup>125</sup> But enforceable agreements, such as contracts of agistment, tenancy, service, and manufacture have always existed.<sup>126</sup> Moreover, the settlement of disputes usually rests on a basis of agreement.<sup>127</sup> The content of the customary laws of Africa has changed significantly in the past and continues to change today, with the increasing degree of incorporation of African communities into national, regional, and international communities as the cause of most changes.<sup>128</sup> Modern economic activities are generally governed by versions of received law, only sometimes adapted to meet local

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<sup>121</sup> Allott 'African Law' op cit (n120) 150-52. Of course, not everyone was treated the same in all contexts.

<sup>122</sup> Ibid. Territorial and political units such as 'tribes' and village communities also exercised powers in many societies.

<sup>123</sup> Ibid at 139, 151.

<sup>124</sup> Ibid at 147.

<sup>125</sup> Mancuso op cit (n113) 16.

<sup>126</sup> Allott 'African Law' op cit (n120) 149-150. These agreements had only so much form as was necessary to publicise their existence, such as the ceremonious giving, receipt, and sharing of the drink.

<sup>127</sup> Ibid.

<sup>128</sup> Woodman op cit (n110) 16.

circumstances.<sup>129</sup> (Ignoring customary law in regard to modern economic activities is problematic, as will be discussed *infra* 3.4.2.)

### 1.6.2 Conceptual Difficulties

Several aspects of customary law (in addition to its constantly changing nature) make it difficult to analyse and write about. First, it is oral and the very act of recording what one believes customary law to be likely distorts it.<sup>130</sup> Secondly, there is disagreement about the meaning and appropriate use of different terminology – traditional, customary, native, or indigenous. The phrase ‘originally African law’ has been suggested.<sup>131</sup> Thirdly, there is a divergence between customary law as it has been sanctioned or enforced by the state (official customary law) and customary law under which the relevant community is actually operating (living customary law). Fourthly, there is sometimes an ideological or political aspect to the conception of customary law. For instance, one view is that customary law is not merely indigenous African law but rather is the result of particular historical circumstances and is relatively recent in origin.<sup>132</sup> Notwithstanding the difficulties involved with conceptualising customary law, it is critical to do so because of its role in Africa with regard to legal development and the relationship between these laws and economic development. Reference to ‘customary law’ throughout this paper is meant to capture the concept of contemporary, living customary laws that, although evolving, are mostly indigenous to traditional African societies.

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<sup>129</sup> Woodman *op cit* (n110) at 26.

<sup>130</sup> Vanderlinden *op cit* (n19) 1065; Mancuso *op cit* (n113) 4.

<sup>131</sup> Mancuso *op cit* (n113) 3 (droits originellement africaine).

<sup>132</sup> Francis G Snyder ‘Colonialism and Legal Form: The Creation of “Customary Law” in Senegal’ in Colin Sumner (ed) *Crime, Justice and Underdevelopment* (1982) 90-91 (Customary law in Africa was an ideology that usually accompanied and formed part of colonial domination.)

## CHAPTER TWO – THE INFORMAL SECTOR

### 2.1 Definition of the Informal Sector

The informal sector plays a dominant role in African economies and is a central issue for economic development, but relatively little is known about the complex reality of informal sector institutions.<sup>133</sup> The term ‘informal’ in this context originated in the 1970s as a way of conceptualizing the unregulated activities of the poor in Third World cities.<sup>134</sup> The distinction between formality and informality in economic activity is a much criticised ‘constructed duality,’ but it has been useful in analysing the phenomenon and structuring official statistics.<sup>135</sup> The problems with the concept of informality arise in part from the multiplicity of definitions and the plurality of measurement methods.<sup>136</sup> Moreover, the formal and informal ends of the economic continuum are often ‘dynamically linked.’<sup>137</sup> Informality should be viewed, therefore, as being a matter of degree, lying on a continuum best captured by a range of indicators.<sup>138</sup> The current official definition of ‘informal sector’ adopted by the International Labour Organisation

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<sup>133</sup> Nancy Benjamin and Ahmadou Aly Mbaye *The Informal Sector in Francophone Africa: Firm Size, Productivity and Institutions* (2012) 1, 4. (Findings based on a study of the urban, informal sector in three capital cities: Dakar (Senegal), Cotonou (Benin), and Ouagadougou (Burkina Faso), as being representative of West Africa, employing a mix of quantitative and qualitative methods using saqdata obtained in 2007 and 2009 from surveys of 900 firms, interviews with stakeholders, and standard national accounts and other public databases.)

<sup>134</sup> Alice Sindzingre ‘The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal’ in Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom (eds) *Linking the Formal and Informal Economy: Concepts and Policies* (2006) 59.

<sup>135</sup> Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom ‘Beyond Formality and Informality’ in Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom (eds) *Linking the Formal and Informal Economy: Concepts and Policies* (2006) 1.

<sup>136</sup> Sindzingre op cit (n134) 58.

<sup>137</sup> Martha Alter Chen ‘Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment’ in Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom (eds) *Linking the Formal and Informal Economy: Concepts and Policies* (2006) 77.

<sup>138</sup> Benjamin & Mbaye op cit (n133) 25-26.

(ILO) is based on characterizing an enterprise as informal, and empirical studies have largely followed this approach.<sup>139</sup>

[The informal sector] consists of units engaged in the production of goods or services with primary objective of generating employment and incomes to the persons concerned [that] typically operate at a low level of organization . . . and on a small scale. Labour relations . . . are based mostly on casual employment, kinship or personal and social relations . . .

There are three related official statistical terms and definitions which are often used imprecisely and interchangeably – informal economy, informal employment, and the informal sector.<sup>140</sup> Informal employment and the informal sector are measured differently and involve somewhat different policy issues and responses.<sup>141</sup> The informal sector, which is a subset of the broader informal economy, is the concern of this paper. The term ‘micro-enterprise’ will be used to refer to an entity or firm – with or without employees – conducting commercial activities or transactions and operating almost entirely within the informal sector, and the term ‘micro-operator’ will be used to refer to the individual actor who owns or operates a micro-enterprise. The informal sector is where the small, usually unregistered, own-account workers that dominate West African economies operate in an environment characterised by the ease of entry, with little capital and equipment, and no access to formal markets or credit, to education and

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<sup>139</sup> Guha-Khasnobi, Kanbur & Ostrom op cit (n135) 4. The statistical definition also distinguishes between ‘family or household enterprise’ (own-account informal enterprises) without permanent employees and the ‘micro-enterprise’ (informal employers) with permanent employees. International Labour Office ‘Resolution Concerning Statistics of Employment in the Informal Sector’ *Report of the Fifteenth International Conference of Labour Statisticians* (1993) 52-53, available at [http://www.ilo.org/public/libdoc/ilo/1993/93B09\\_65\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1993/93B09_65_engl.pdf), accessed on 10 July 2015.

<sup>140</sup> Martha Alter Chen *The Informal Economy: Definitions, Theories and Policies* (2012) 8, available at [http://wiego.org/sites/wiego.org/files/publications/files/Chen\\_WIEGO\\_WP1.pdf](http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf), accessed on 10 July 2015. *Informal employment* refers to employment without legal and social protection—both inside and outside the informal sector. The *informal economy* refers to all units, activities, and workers and the output from both the informal sector and the informal economy. International Labour Office, *Report of the Seventeenth International Conference of Labour Statisticians* (2003) 47, 51, available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms\\_087585.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_087585.pdf), accessed on 10 July 2015.

<sup>141</sup> Ibid.

training, or to services and amenities.<sup>142</sup> A significant dimension in the concept of informality is the notion of informal as being outside the reach of different levels and mechanisms of official governance.<sup>143</sup> But informal norms and practices are not so much in opposition to formal laws as they are reflective of a different reality and responsive to different needs.

## 2.2 Size of the Informal Sector

There is a lack of sufficient data on the size, composition, and contribution of the informal sector, and also problems that limit the international comparability of data.<sup>144</sup> There is no single statistical aggregate that corresponds to the concept of informality.<sup>145</sup> Moreover, many countries exclude agriculture from their measurements of the informal sector, while others measure only the urban informal sector.<sup>146</sup> Nevertheless, what is clear is that the informal sector is the most significant portion of the economies of Africa and is increasing both in terms of overall employment and as a share of the total economy. In West Africa as much as 90 per cent of total employment and up to 60 per cent of gross domestic product is produced by informal activities.<sup>147</sup> For instance, based on the most recently available data, the ILO calculated informal sector employment to be 70 percent in Côte d'Ivoire (2008) and 71 percent in Mali (2004).<sup>148</sup> Informal traders in the African countries for which data is available account for between 85 and 99 per cent

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<sup>142</sup> Jacques Charmes 'Micro-enterprises in West Africa' in Kenneth King & Simon McGrath *Enterprise in Africa: Between Poverty and Growth* (1999) 71.

<sup>143</sup> Guha-Khasnobi, Kanbur & Ostrom op cit (n135) 5.

<sup>144</sup> Chen 'Rethinking' op cit (n137) 80.

<sup>145</sup> Sindzingre op cit (n134) 61.

<sup>146</sup> Chen 'Rethinking' op cit (n137) 81.

<sup>147</sup> Benjamin & Mbaye op cit (n133) 48

<sup>148</sup> International Labour Office *Women and Men in the Informal Economy: A Statistical Picture*, 2 ed (2013) 10, available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms\\_234413.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf), accessed on 10 September 2015 (detailed statistical analysis of employment in the informal economy for 47 countries with economies in transition; Mali and Côte d'Ivoire only two countries in West and Central Africa included in the study.) The figures are in proportion to total non-agricultural employment.

of total employment in trade and between 46 and 70 percent of total value added in trade.<sup>149</sup> About half of those operating in the informal sector are poor, own-account operators.<sup>150</sup> Some of the largest and fastest growing sectors in West African economies (wholesale and retail trade, transportation, restaurants, and construction) are dominated by informal firms, with retail trade being the largest of informal sector activities.<sup>151</sup>

### 2.3 Nature of the Informal Sector

The United Nations Commission on Legal Empowerment of the Poor report published in 2008, 'Making the Law Work for Everyone,' states that 'informality is here to stay and is an essential feature of the global economy.'<sup>152</sup> The report also notes that lack of protection by the legal system renders micro-enterprises and their operators vulnerable and insecure.<sup>153</sup> The vast majority of the informal sector workforce have never held a job in the formal sector and are often engaged in hereditary or traditional occupations.<sup>154</sup> A large segment of micro-operators in West Africa are highly mobile without a fixed work-place.<sup>155</sup> On average, compared to formal workers, informal workers have lower earnings and face higher risks, are less likely to enjoy economic opportunities and legal protections, and are less able to exercise economic rights and collective voice.<sup>156</sup> Micro-operators cannot separate personal assets from business assets and they have difficulties offering secure collateral for loans.<sup>157</sup> Therefore, access to formal sector credit is limited

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<sup>149</sup> Caroline Skinner 'Street Trading in Africa: Demographic Trends, Planning and Trader Organisation' in Vishnu Padayachee *The Political Economy of Africa* (2010) 215.

<sup>150</sup> Michal Lyons 'Pro-Poor Business Law? On MKURABITA and the Legal Empowerment of Tanzania's Street Vendors' (2013) 5 *Hague Journal on the Rule of Law* 74 at 77. (MKURABITA is the Swahili acronym for Land and Business Formalisation Programme.)

<sup>151</sup> Benjamin & Mbaye op cit (n133) 49.

<sup>152</sup> Lyons op cit (n150) 75.

<sup>153</sup> Ibid at 77.

<sup>154</sup> Chen 'The Informal Economy' op cit (n140) 6.

<sup>155</sup> Benjamin & Mbaye op cit (n133) 24.

<sup>156</sup> Chen 'The Informal Economy' op cit (n140) 20.

<sup>157</sup> Lyons op cit (n150) 75, 88.

or non-existent.<sup>158</sup> Micro-operators opt for trading practices that minimise the potential for breach, and sales are thus made mostly on a cash-and-carry basis.<sup>159</sup> The informal sector activities represent a survival strategy for the people involved.<sup>160</sup> The more difficult the economic context, the more extensive the informal sector.<sup>161</sup> The informal sector has not only grown in many countries but it has also emerged in new forms and places.<sup>162</sup> Criminal activities (defined as those that operate illegally and deal in illegal goods and services) are only a small part of the entire informal economy, and most informal enterprises produce and distribute legal goods and services.<sup>163</sup> Few micro-enterprises operate in complete isolation from formal firms, and many have production or distribution relations with formal enterprises.<sup>164</sup> The effects of globalisation, trade, and foreign direct investment on the informal sector are uncertain.<sup>165</sup> Micro-enterprises rarely export.<sup>166</sup> Street vending by small-scale traders is estimated to be the largest sub-sector of the informal sector, involving many thousands of traders in any major African city.<sup>167</sup> Because of relatively low barriers to entry and set-up costs, newcomers to the cities, including foreign migrants, opt for street trading as a means of survival.<sup>168</sup> Street traders lack the security and advantages of a fixed location, including storage and access to sanitation and utilities, and are often subject to random restrictions and even ‘eviction’ by

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<sup>158</sup> Benjamin & Mbaye op cit (n133) 24.

<sup>159</sup> Marcel Fafchamps ‘Networks, Communities, and Markets in Sub-Saharan African’ (2001) 10 *Journal of African Economies* 109 at 116.

<sup>160</sup> Chen ‘The Informal Economy’ op cit (n140) 3.

<sup>161</sup> Charmes op cit (n142) 72.

<sup>162</sup> Chen ‘Rethinking’ op cit (n137) 75.

<sup>163</sup> Ibid at 80.

<sup>164</sup> Chen ‘The Informal Economy’ op cit (n140) 12.

<sup>165</sup> Sher Verick ‘The Impact of Globalisation on the Informal Sector in Africa’ (2006) 4. Available at [http://www.iza.org/conference\\_files/worldb2006/verick\\_s872.pdf](http://www.iza.org/conference_files/worldb2006/verick_s872.pdf), accessed on 1 June 2015.

<sup>166</sup> Benjamin & Mbaye op cit (n133) 120.

<sup>167</sup> Lyons op cit (n150) 75.

<sup>168</sup> Ibid.

governments.<sup>169</sup> This ‘spatial informality’ makes street vendors particularly vulnerable.<sup>170</sup>

### 2.3.1 Social Networks

The norms and institutions of the informal sector exert a powerful influence on how markets are organised in West African economies.<sup>171</sup> Because of the relative absence of large corporations and public agencies in Africa, markets might even play a more prominent role in Africa than in more developed economies.<sup>172</sup> But unlike the markets portrayed in standard economic theory, African markets operate amidst informal institutions that emphasise relationships and information sharing within communities and networks.<sup>173</sup> Informality is not just about the failure to comply with legal regulations; it also necessitates the development of alternative organisational structures, which constitute ‘social networks’ or informal forms of economic organization.<sup>174</sup> There is great diversity among African social networks (ethnic, religious, occupational) within a given society or region and across the continent.<sup>175</sup> Although there are differing perspectives about the role of social networks, recent development studies have emphasised a positive, developmental role.<sup>176</sup> Social networks are generally found to

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<sup>169</sup> Lyons op cit (n150) 75.

<sup>170</sup> Ibid.

<sup>171</sup> Stephen Golub and Jamie Hansen-Lewis ‘Informal Trading Networks in West Africa: The Mourides of Senegal/The Gambia and the Yoruba of Benin/Nigeria’ in Nancy Benjamin and Ahmadou Aly Mbaye *The Informal Sector in Francophone Africa: Firm Size, Productivity and Institutions* (2012) 190.

<sup>172</sup> Fafchamps op cit (n159) 112-115. Large corporations, government agencies and banks are all examples of hierarchies that rely on command and control to allocate resources. Africa has few and only small hierarchies that are not effective. Outside of gift exchange, which continues to play a major role in the allocation of subsistence goods in much of Africa, markets are the primary allocation and distribution mechanism.

<sup>173</sup> Ibid at 118, 135.

<sup>174</sup> Kate Meagher ‘Social Capital, Social Liabilities, and Political Capital: Social Networks and Informal Manufacturing in Nigeria’ (2006) 105 (421) *African Affairs* 553 at 557, 559.

<sup>175</sup> Ibid at 556.

<sup>176</sup> Ibid at 555. Some view social networks as mostly criminal enterprises or impediments to economic growth.



engender trust and flexibility, reduce transaction costs, and facilitate integration into the global economy.<sup>177</sup> They offer risk reduction and an ‘informal mechanism of economic coordination capable of filling gaps in formal institutions and regulatory capacity.’<sup>178</sup> But they are susceptible to breakdown or fragmentation in the face of instability in the wider economic context in which they operate.<sup>179</sup> Overall social networks have failed to promote broader economic development in West Africa.<sup>180</sup> Meagher argues that economic and political reforms, rapid economic expansion, and the lack of support from relevant state institutions have undermined African social networks, and their economic potential has been eroded by the pressures of liberalisation, globalisation, and political opportunism.<sup>181</sup>

## 2.4 Informal Sector in West Africa

### 2.4.1 Networks and Cross-Border Trade

Precolonial West Africa had the greatest indigenous economic development in Africa and there was relative unity in West African economies.<sup>182</sup> Regularly scheduled and well-organised markets were common in West Africa, involving intricate trade systems moving products from local markets to larger market systems throughout the region.<sup>183</sup> Today the informal sector actors in West Africa are predominately micro-enterprises, but these micro-enterprises co-exist with some large informal firms and well-developed trading networks.<sup>184</sup> In Senegal, for example, one trader is estimated to control more than

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<sup>177</sup> Meagher op cit (n174) 553-54, 571.

<sup>178</sup> Ibid at 554, 557.

<sup>179</sup> Ibid at 556, 579.

<sup>180</sup> Ibid at 554.

<sup>181</sup> Ibid at 579-80.

<sup>182</sup> Elliott P. Skinner ‘West African Economic Systems’ in Elliott P. Skinner (ed) *Peoples and Cultures of Africa: An Anthropological Reader* (1973) 205.

<sup>183</sup> Ibid at 215.

<sup>184</sup> Benjamin & Mbaye op cit (n133) 8. Some of these large informal firms are registered and pay taxes, but underreport sales and profits. Id 2, 7.

a third of the imports of rice.<sup>185</sup> Social and cultural settings play a prominent role in the spread of the informal sector in West Africa. Ethnic and social/religious kinship groups are particularly significant in West Africa because of weak formal institutions and the continuing importance of kinship ties dating from the precolonial era.<sup>186</sup> A major part of the informal sector in West Africa revolves around informal, cross-border trade (smuggling) to evade import barriers.<sup>187</sup> The volume of unrecorded and untaxed trade between neighbouring countries in West Africa is very large.<sup>188</sup> Many of the major smuggling enterprises are very large-scale operations in which kinship networks play a major role.<sup>189</sup> Kinship networks can have positive as well as negative effects on economic development. On the one hand, group solidarity and mutual trust – by enabling contract performance, access to financing, and information exchange – can help expand commercial activities.<sup>190</sup> On the other hand, kinship networks can be exclusionary, inefficient, and can even promote violation of the rules and norms of the formal economy.<sup>191</sup> They often substitute for state provision of public goods and adhere to a set of informal norms of conduct and enforcement mechanisms.<sup>192</sup> Traders belonging to such networks are unlikely to make a clear distinction between the norms governing their social relations and those applicable in business matters.<sup>193</sup>

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<sup>185</sup> Benjamin & Mbaye op cit (n133) 4.

<sup>186</sup> Golub & Hansen-Lewis op cit (n171) 173-74.

<sup>187</sup> Stephen Golub 'Government Policies, Smuggling, and the Informal Sector' in Nancy Benjamin & Ahmadou Aly Mbaye *The Informal Sector in Francophone Africa: Firm Size, Productivity and Institutions* (2012) 216. Smuggled goods include sugar, clothing, used cars, and pharmaceuticals, including counterfeit drugs.

<sup>188</sup> Ibid. The informal sector provides almost no national government revenue resulting in an estimated loss of fiscal revenue of between 3 and 10 percent of GDP.

<sup>189</sup> Benjamin and Mbaye op cit (n133) 5.

<sup>190</sup> Golub and Hansen-Lewis op cit (n171) 173.

<sup>191</sup> Ibid. (The authors see the informal sector as expanding to the detriment of the formal sector and stress the illegality of smuggling and tax evasion.)

<sup>192</sup> Ibid.

<sup>193</sup> Paquin op cit (n46) 103.

#### 2.4.2 Ethnic and Kinship Groups: Mouride and Yoruba.

The ethnic and kinship groups in the region have specific defining commercial practices transmitted within families and the community.<sup>194</sup> '[West] African trade . . . follows a system of networking in which each trading community has been for very long and so has a monopoly over a particular area or a specific product line.'<sup>195</sup> Case studies of the Mourides in Senegal and the Yoruba in Benin illustrate the continuing importance of kinship trading networks that grew out of traditional African societies.<sup>196</sup> The Mourides are a Muslim brotherhood originating in the nineteenth century and the Yoruba are an ethnic group predating the colonial era.<sup>197</sup> Both groups rely on a hierarchical organizational structure and kinship ties, and the belief in Islam is a source of solidarity and motivation within both groups.<sup>198</sup> The worldwide trading networks of the Mourides extend to Europe, Asia, and North America from Senegal and The Gambia, with their centre in the Sandaga market in Dakar.<sup>199</sup> In addition to domestic commerce and international trade, Mourides dominate other sectors such as transport and real estate.<sup>200</sup> For example, they own many the minivans that serve as the major mode of public transport (car rapides).<sup>201</sup> Touba, the second largest city in Senegal, is the spiritual home of the Mouride and is de-facto a city-state within Senegal.<sup>202</sup> The Yorubas are one of the most populous and urbanised ethnic groups in sub-Saharan Africa, most of whom speak a common language (Yoruba).<sup>203</sup> Their traditional region encompasses the central areas of Benin and Togo and the

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<sup>194</sup> Isabelle Deschamps 'Commercial Law Reform in Africa' in Nokuhle Madolo (ed) *International Economic Law – The Voices of Africa* (2012) 49.

<sup>195</sup> Ibid, quoting John Igwe *Les Yoruba en Afrique de l'ouest francophone, 1910-1980* (2003).

<sup>196</sup> Golub and Hansen-Lewis op cit (n171) 190.

<sup>197</sup> Ibid at 174.

<sup>198</sup> Ibid at. 186.

<sup>199</sup> Ibid at 174, 178.

<sup>200</sup> Ibid at 179.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid at 174.

<sup>203</sup> Ibid at 182, 186.

southwestern states of Nigeria, but has spread into Côte D'Ivoire, Niger, Burkina Faso, and Senegal, with their sphere of activity generally limited to West Africa where they tend to transact only with other Yoruba.<sup>204</sup> The Yoruba play a leading role in smuggling between Nigeria and Benin and have been dominant in the re-export trade in most products.<sup>205</sup> Yoruba traders are major players in the largest open-air market in West Africa – Dantokpa market in Cotonou, Benin – which is a centre for regional cross-border trade.<sup>206</sup> The Dantokpa market, like Sandaga and other similar markets, is largely off-limits to the government.<sup>207</sup> Allegiance to traditional sources of authority, such as the Yoruba chiefs and the Mouride marabouts, is often more powerful than the authority of the state.<sup>208</sup>

## 2.5 Tontines

One of the most important informal institutions that proliferate in West Africa is the local mutual aid association commonly called a 'tontine.'<sup>209</sup> The Yoruba and Mourides, for instance, have a well-developed system of tontines.<sup>210</sup> These associations are known by various names depending on the specific functions of the association and local idiom.<sup>211</sup>

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<sup>204</sup> Golub & Hansen-Lewis op cit (n171) 183, 186, 190.

<sup>205</sup> Ibid at 187.

<sup>206</sup> Ibid at 188.

<sup>207</sup> Ibid at 191.

<sup>208</sup> Ibid at 189.

<sup>209</sup> The kind of local financial self-help association operating throughout West Africa is not really a classic 'tontine,' which is more of an annuity scheme. The word 'tontine' is derived from the name of Lorenzo de Tonti from the seventeenth century. Kent McKeever 'A Short History of Tontines'" (2009) 15 *Fordham Journal of Corporate and Financial Law* 491, 492.

<sup>210</sup> Golub & Hansen-Lewis op cit (n171) 186.

<sup>211</sup> The term most often used is 'tontine' in francophone West Africa and 'esusu' in anglophone West Africa. Both are collective names, comprising various types of organizations or associations. Much of our knowledge of these associations come from studies of two ethnic groups -- the Bamileke in Northwest Cameroon and the Ibo in Southeast Nigeria. F.J.A. Bouman 'ROSCA and ASCRA: Beyond the Financial Landscape' in F.J.A. Bouman and O. Hospes (eds) *Financial Landscapes Reconstructed: The Fine Art of Mapping Development* (1994) 22-1, 22-3 available at <http://www.w.sadhan.net/Adls/Dl4/DocumentandCaseStudiesMAin/DeliveryModelpapersonline/FinancialLands/FLR22.pdf> accessed on 15 August 2015.

They serve both an economic and a social function.<sup>212</sup> Tontines can be viewed as the embodiment of the African cultural value of mutual aid and cooperation.<sup>213</sup> Since members are personally acquainted with each other, the economic status and creditworthiness of members are known by all.<sup>214</sup> This peer monitoring requires a closely knit community with high levels of social cohesion and affiliation.<sup>215</sup> Tontines are the predominant form of savings organization in the informal sector and provide a significant source of capital for micro-enterprises.<sup>216</sup> The regular contributions are also a way of paying a type of insurance premium for the use of a social safety net.<sup>217</sup> The social security function of tontines covers rites of passage, life cycle events, spiritual and religious ceremonies, education, and sometimes even insuring members and their relatives against the consequences of illness, accident, and death.<sup>218</sup> Tontines are formed in neighbourhoods, by community, religious, or ethnic groups, or can be occupational or work-place based.<sup>219</sup> They are autonomous institutions with voluntary participation, characterised by a high degree of self-sufficiency and self-regulation.<sup>220</sup> Tontines facilitate social networking and information exchange.<sup>221</sup> Tontines work, in part, because of intricate, strict rules of punctuality and procedure, observance of rituals, careful choice

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<sup>212</sup> Christy Chung Hevener 'Alternative Financial Vehicles: Rotating Savings and Credit Associations (ROSCAs)' (2006) 6-7, available at <https://www.philadelphiafed.org/...papers/discussionpaper-ROSCAs.pdf>, accessed on 20 June 2015.

<sup>213</sup> Alain Henry 'Using Tontines to Run the Economy' (2003) 3-5, available at <http://www.ecole.org/en/seances/SEM105>, accessed on 1 June 2015. Tontines are generally linked to the founding myths of the society. Id 6.

<sup>214</sup> Hevener op cit (212) 19.

<sup>215</sup> Ibid at 24.

<sup>216</sup> Bernd Balkenhol and EH Gueye 'Tontines and the Banking System – Is There a Case for Building Linkages' (1992) 8-9, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/documents/publication/wcms\\_118281.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_118281.pdf), accessed on 15 July 2015.

<sup>217</sup> Ibid.

<sup>218</sup> Bouman op cit (n211) 22-2.

<sup>219</sup> Balkenhol & Gueye op cit (n216) 5.

<sup>220</sup> Ibid at 7.

<sup>221</sup> Hevener op cit (n212) 20.

of members, structured social relationships, and serious sanctions.<sup>222</sup> In a tight-knit community with strong cultural ties social disapproval could mean banishment from the group and the end of access to credit.<sup>223</sup> The effectiveness of this discipline can only be understood against the background of the comprehensive nature of financial and social links among members.<sup>224</sup> Most significant changes in tontines are a result of the rapid evolution of urban tontines due to the influx of rural migrants, who have duplicated traditional village structures in the city to obtain some form of security and stability.<sup>225</sup> It is estimated that more than 80 per cent of all rural migrants to cities belong to urban tontines.<sup>226</sup> Even in urban areas tontines maintain strong links with their rural areas of origin.<sup>227</sup> Funeral expenses are often borne by the tontine, to which every migrant must contribute on penalty of ostracism and loss of the right to burial in ancestral soil.<sup>228</sup> According to one researcher, in Douala, Cameroon ‘thousands of women, young people and unemployed could not survive without their tontine.’<sup>229</sup> A tontine carries out four basic types of activities.<sup>230</sup> One is the social security fund for emergencies and life cycle events with irregular, ad hoc contributions when the need arises. The second is the Rotating Savings and Credit Association (‘ROSCA’). The third is the Accumulating Savings and Credit Association (‘ASCRA’), a type of bank or credit union. The fourth activity is that of collective investment, such as a taxi or restaurant, with profits accruing to members. There are also associations that are hybrids of these four basic activities. Lending is the primary function in both the ROSCA and the ASCRA.<sup>231</sup> In addition to

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<sup>222</sup> Henry op cit (n213) 6.

<sup>223</sup> Hevener op cit (n212) 20.

<sup>224</sup> Balkenhol & Gueye op cit (n216) 8.

<sup>225</sup> Bouman op cit (n211) 22-9.

<sup>226</sup> Ibid at 22-4.

<sup>227</sup> Balkenhol & Gueye op cit (n216) 3.

<sup>228</sup> Bouman op cit (n211) 22-3.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Bouman op cit (n211) 22-1.

access to credit, their economic benefits include lower transaction costs, accessibility, and flexibility.<sup>232</sup> In a ROSCA, the pooled contributions are immediately redistributed.<sup>233</sup> In a ASCRA, pooled savings are accumulated for a specified time, invested or lent out against interest, and then redistributed in whole or in part.<sup>234</sup> The number of members in tontines varies considerably, from as few as a dozen or so to several hundred, depending on the type and purpose.<sup>235</sup> The life-cycle of an ASCRA can extend into years, whereas the life-cycle of a ROSCA is usually only one year and not much longer.<sup>236</sup>

### 2.5.1 Rotating and Savings Credit Associations

Most tontines can be classed as ROSCAs.<sup>237</sup> Despite their many variations, ROSCAs follow the same basic pattern.<sup>238</sup> At the behest of a leader or organiser, a select group of people who share some common bond meet regularly and contribute a predetermined, fixed amount to a common fund. The amount of this fund (or pot) is distributed periodically to each participant in turn on a rotating basis. After the last member has received the pot, the ROSCA disbands or dissolves. The number of participants, the regularity of meetings, and the amount of contribution are determined based on the needs of the group.<sup>239</sup> In a simple or random ROSCA, everyone contributes the same amount at each meeting and receives the same size pot. By the end of the ROSCA, everyone will have received, in lump sum, the total of their monthly contributions. The consumer durable ROSCA is a slight variation on the random ROSCA and is popular among

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<sup>232</sup> Hevener op cit (n212) 20, 21.

<sup>233</sup> Bouman op cit (n211) 22-1.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid at. 22-2.

<sup>236</sup> Ibid.

<sup>237</sup> McKeever op cit (n209) 561.

<sup>238</sup> Hevener op cit (n212) 7.

<sup>239</sup> Ibid. The order of rotation can be determined in a number of ways, including by random assignment, or by bidding/auction, or by social status.

women, where instead of rotating a lump sum of funds, participants receive a physical good agreed upon by the group.<sup>240</sup> Many ROSCA meetings involve ritualistic practices and social observances and also provide opportunities for networking.<sup>241</sup> The primary benefit of a ROSCA is the accelerated access to capital or a commodity, since participants receive money or goods sooner as a result of their membership than if they were to save individually.<sup>242</sup> ROSCA participants are motivated by considerations of social relationships and standing.<sup>243</sup> Although the last receiving member derives no apparent economic benefit, she does receive social benefits since her membership is a step toward building her reputation to the point where she may be credible enough to organise her own ROSCA.<sup>244</sup>

## 2.6 Policy Implications

Consideration of the complex and diverse informal sector in West Africa requires us to re-examine presumptions about the relationship between the informal sector and economic development – most significantly, the presumption that informality is necessarily an obstacle to development. For many years the dominant view in the development field was that the informal sector was ‘symptomatic of pathology’ and the key to development was to formalise all micro-enterprises.<sup>245</sup> A newer understanding of the informal sector views it as an adaptive response to existing realities and, in some respects, as being consistent with the evolution of traditional or customary institutions.<sup>246</sup> Consequently, the focus should not be on moving micro-enterprises from the informal to

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<sup>240</sup> Hevener op cit (n212) 8. The organiser usually obtains a discounted price for the goods in exchange for the guaranteed purchase of a certain number of goods.

<sup>241</sup> Ibid at 20.

<sup>242</sup> Ibid at 21. Distributions to all members, except the last, are technically interest-free loans.

<sup>243</sup> Ibid at 19.

<sup>244</sup> Ibid at 21.

<sup>245</sup> Claire Moore Dickerson ‘Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law’ (2011) 59 *Am. J. Comp. L.* 179 at 181 (author uses the term ‘nano-entrepreneur’).

<sup>246</sup> Ibid at 182.



the formal sector, but rather on creating for them an environment comparable to what enterprises in more developed economies enjoy.<sup>247</sup> Local, informal institutions can contribute to a type and level of economic development compatible with local norms and practices.<sup>248</sup> However desirable it might be, it is unlikely that most micro-enterprises can be formalised.<sup>249</sup> The challenge is to decrease the costs and vulnerabilities of working informally and to increase the benefits of working formally.<sup>250</sup> Supporting micro-enterprises is a key to promoting growth and reducing poverty.<sup>251</sup> Successful intervention requires multiple, back-up or complementary services.<sup>252</sup> Micro-operators could be empowered through targeted capacity building, such as functional literacy and numeracy training programs.<sup>253</sup> One criterion for policy intervention is to apply the ‘principle of subsidiarity in a multi-level system,’ the key to which is to devolve authority to the lowest level that can take effective action related to the scale of a particular issue.<sup>254</sup> Local communities can undertake many forms of collective action more effectively by drawing on their own evolved institutions, but for some purposes the appropriate level is national, regional, or even international.<sup>255</sup> Another criterion is not to replace or ‘crowd out’ the informal rules and institutions of self-organised groups that are generally understood and relatively effective.<sup>256</sup> For instance, reforms could seek to assist tontines and take lessons from their positive aspects rather than to replace them or

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<sup>247</sup> Dickerson ‘Functional’ op cit (n245) 182.

<sup>248</sup> Glenn op cit (n13) 56.

<sup>249</sup> Guha-Khasnobis, Kanbur & Ostrom op cit (n135) 14.

<sup>250</sup> Chen ‘Rethinking’ op cit (n137) 90.

<sup>251</sup> Ibid at 75. For a different perspective, see Benjamin & Mbaye op cit (n133) 71 (should not focus on micro-enterprises as their potential is limited).

<sup>252</sup> Guha-Khasnobis, Kanbur & Ostrom op cit (n135) 14.

<sup>253</sup> Lyons op cit (n150) 94.

<sup>254</sup> Guha-Khasnobis, Kanbur & Ostrom op cit (n135) 11.

<sup>255</sup> Ibid at 11.

<sup>256</sup> Ibid at 13.

seek to integrate them into formal sector institutions. The approach should be to promote policies and regulations that are ‘fit for purpose’ and accessible to micro-operators.<sup>257</sup>

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<sup>257</sup> Lyons op cit (n150) 93.

## CHAPTER THREE – OHADA AND THE INFORMAL SECTOR

### 3.1 Overview of OHADA<sup>258</sup>

OHADA is an international organization and a supranational system of business laws in West and Central Africa.<sup>259</sup> There are now 17 nations that are signatories to the OHADA Treaty: Guinea-Bissau, Senegal, Central African Republic, Mali, the Comoros, Burkina Faso, Benin, Niger, Côte d'Ivoire, Cameroon, Togo, Chad, the Republic of Congo, Gabon, Equatorial Guinea, Guinea, and the Democratic Republic of Congo (Member States). With a few exceptions, all are also members of the Franc-Zone, are French-speaking, and have a civil law tradition.<sup>260</sup> Member states of the African Union may join OHADA by acceding to the Treaty, and non-members of the African Union can be invited to join unanimously by OHADA Member States.<sup>261</sup> OHADA is part of a larger effort at economic integration within West and Central Africa.<sup>262</sup>

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<sup>258</sup> Several secondary sources were drawn upon for this section: Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed* (2012); Renaud Beauchard and Mahutodji JV Kodo *Can OHADA Increase Legal Certainty in Africa?* (2011), available at <http://documents.worldbank.org/curated/en/266761467990085419/Can-OHADA-increase-legal-certainty-in-Africa>, accessed on 10 February 2015; and Boris Martor, Nanette Pilkington, David S Sellers, and Sebastien Thouvenot *Business Law in Africa: OHADA and the Harmonization Process* (2002).

<sup>259</sup> OHADA was formed by the Treaty of Port Louis (Mauritius) on 17 October 1993, and came into force on 18 September 1995 (1993 Treaty). A revised Treaty was signed in Québec on 17 October 17 2008, which came into force on 21 March 2010 (2008 Treaty) (consolidated, the Treaty). Available with unofficial English translations at <http://www.ohada.com/traite.html>.

<sup>260</sup> Martor op cit (n258) 5.

<sup>261</sup> Ibid at 6 (Treaty, art 53). The Union of the Comoros is the only current member outside the region.

<sup>262</sup> This includes the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union (Union Économique et Monétaire Oest Africaine, or UEMOA), the Central African Monetary and Economic Community (Communauté Économique et Monétaire de l'Afrique Centrale, or CEMAC), and ultimately the African Economic Community (AEC) within the African Union. Unlike OHADA, these other institutions are monetary, trade, or customs unions.

### 3.1.1 Objectives

OHADA begins from the same premise as most rule of law projects, which is that laws must define and protect property rights and enforce contracts.<sup>263</sup> As set forth in the Preamble to the 2008 Treaty, the goals of OHADA are

. . .to make new progress towards African unity, and . . . to reinforce legal and judicial security in the [region], in order to guarantee a climate of trust that will contribute to making Africa a centre of development; [and] . . . to use the harmonisation of business law as an instrument to reinforce the rule of law, as well as legal and economic integration . . .<sup>264</sup>

Article 1 of the consolidated Treaty states:

The objective of the present Treaty is the harmonisation of business laws in the States Parties by the elaboration and adoption of ‘simple, modern common rules well adapted to their economies, by establishing appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes.’<sup>265</sup>

The articulated purpose of OHADA is to increase domestic and foreign trade and investment in and among Member States in order to enhance economic development in the region.<sup>266</sup> The theory is that because of their uniformity, clarity, and accessibility the OHADA laws will reduce transactions costs and thus create an environment conducive to investment.<sup>267</sup> OHADA laws focus only on enhancing the predictability of business transactions at the enterprise level, not on political economy or macroeconomic issues.<sup>268</sup>

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<sup>263</sup> Beauchard & Kodo op cit (n258) 6.

<sup>264</sup> 2008 revised Treaty, available at <http://www.ohada.com/traite.html>.

<sup>265</sup> Dickerson (ed) *Unified Business Laws* op cit (n258) 144 (app 2). These objectives were also stated in the Preamble to 1993 Treaty.

<sup>266</sup> Claire Moore Dickerson ‘Harmonizing Business Laws in Africa: OHADA Calls the Tune’ (2006) 44 *Colum. J. Transnat’l L.* 17 at 20, 40 (fn3).

<sup>267</sup> Ibid at 24.

<sup>268</sup> Ibid at 40.

### 3.2 Institutional Framework<sup>269</sup>

OHADA is comprised of the following institutions: (1) the Council of Ministers; (2) the Permanent Secretariat headquartered at Yaoundé, Cameroon; (3) the Common Court of Justice and Arbitration (CCJA) headquartered at Abidjan, Côte d'Ivoire; (4) the Regional Training Centre for Legal Officers (Ecole Régionale Supérieure de la Magistrature, or ERSUMA) headquartered at Porto Novo, Benin; and, (5) the Conference of Heads of State and of Government.<sup>270</sup> The Government of Senegal is the Depository Government for all Treaty instruments.<sup>271</sup> The Council of Ministers, composed of the Ministers of Justice and Ministers of Finance of all the Member States, is the supreme decision-making body of OHADA with both legislative and regulatory functions. The Council may also request advisory opinions from the CCJA. The Permanent Secretariat is the executive branch, managed and directed by a Permanent Secretary who represents OHADA and assists the Council of Ministers, including in the preparation and publication of the Uniform Acts.<sup>272</sup> In its judicial capacity, the CCJA is the sole supranational court regarding interpretation of the Treaty and the Uniform Acts, and CCJA also has jurisdiction to render non-binding advisory opinions and interpretations. Judgments of national courts relating to OHADA law are subject to final appeal before the CCJA, whose decisions are final and binding, although enforcement is governed by national procedures. The CCJA also acts as an arbitration centre. The main role of ERSUMA is to improve the legal environment in the member states by providing training in OHADA law. The Conference of Heads of State and of Government, composed of the heads of state of the member states, is a forum for dealing with political issues on any

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<sup>269</sup> See generally Martor op cit (n258) 8-17; Beauchard & Kodo op cit (n258) 10-13; Martha Simo Tumnde 'Cameroon Offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts' in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed* (2012) 58-64; and Claire Moore Dickerson 'Perspectives on the Future' in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed* (2012) 110-17.

<sup>270</sup> Treaty, art 3. The Conference of Heads of State and Government was created in the 2008 Treaty (art 27).

<sup>271</sup> Treaty, art 57.

<sup>272</sup> Dickerson (ed) *Unified Business Laws* op cit (n258) 144, 155 app 2 (art 40).

question relating to the OHADA treaty.<sup>273</sup> OHADA is funded from annual contributions paid by the Member States and also from aid from other international organizations and foreign states.<sup>274</sup> OHADA was and remains largely funded by the French government.<sup>275</sup>

### 3.2.1 Uniform Acts<sup>276</sup>

In pursuance of its aims, OHADA has so far promulgated nine standard pieces of legislation on specific areas of business law called Uniform Acts (Acts). The Acts cover general commercial law, commercial companies and economic interest groups, secured transactions, simplified debt collection and enforcement measures, bankruptcy, arbitration, accounting, carriage of goods by road, and cooperative companies.<sup>277</sup> The Acts are directly applicable in all the Member States and supersede all national legislation on the same topic in each country.<sup>278</sup> The Acts modernise the old, mostly French business laws previously applicable in Member States.<sup>279</sup> With minor exceptions, they are basically ‘carbon copy’ transplants from French business law.<sup>280</sup> Subject matter jurisdiction under OHADA is very broad, potentially covering any other subject related to business or commercial enterprise that the Council of Ministers unanimously decides to include.<sup>281</sup>

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<sup>273</sup> Hon. Justice Mohammed Baba Idris ‘Harmonization of Business Laws in Africa – An Insight into the Laws, Issues, Problems, and Prospects’ in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed* (2012) 31, 35.

<sup>274</sup> Martor op cit (n258) 6.

<sup>275</sup> Deschamps ‘Commercial Law Reform’ op cit (n194) 43.

<sup>276</sup> See Idris op cit (n273) 64-79; Tumnde op cit (n269) 38-54. The Uniform Acts (Actes Uniformes) are published in French in the OHADA Official Journal (Journal Officiel, or JO) and in the national official journals of the member states.

<sup>277</sup> Beauchard & Kodo op cit (n258) 9.

<sup>278</sup> Beauchard & Kodo op cit (n258) 15. (art. 10 abrogation is comprehensive).

<sup>279</sup> Dickerson ‘OHADA Calls the Tune’ op cit (n266) 59. Among Member States, only Senegal, Guinea, and Mali had previously attempted a systematic review of business law after independence. (fn 171).

<sup>280</sup> David Hiez and Séverine Menétrey ‘Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organization for the Harmonization of Business Law in Africa (OHADA) and Law and Development’ (2015) 8(2) *Law and Development Review* 433 at 442.

<sup>281</sup> Dickerson (ed) *Unified Business Laws* op cit (n258) 144 (art 2, Treaty).

The Uniform Act on General Commercial Law (UA-GCL) provides the basic rules of business activity and covers subjects which do not fall within the ambit of the other more specific Acts, including the status of a commerçant (commercial operator, merchant, or trader), the commercial registry, the leasing of commercial premises, commercial intermediaries, the operation and sale of businesses (fonds de commerce), and the sale of goods.<sup>282</sup> The provisions of the UA-GCL are applicable to every commercial operator or trader and economic interest group which has its place of business or registered office in any of the Member States.<sup>283</sup> In addition, commercial operators must keep accounting books (journal, general ledger, and annual accounts ledger) and annual financial statements must be prepared in a form that complies with the provisions of the Uniform Act on Accounting Law.<sup>284</sup> The Uniform Act on Secured Transactions (UA-ST) is designed to spur the flow of credit within the OHADA region and is a prime concern for foreign investors.<sup>285</sup> The UA-ST governs the conditions under which securities must be registered, and in many cases a registration filing is required to perfect the security interest in order for it to be enforceable.<sup>286</sup>

Revisions under the 2008 Treaty to the UA-ST and the UA-GCL made a few innovations that could assist micro-operators.<sup>287</sup> Provisions were added in the UA-GCL creating a new category of commercial operator as an alternative to the commerçant, the ‘entreprenant’ (enterpriser or individual entrepreneur), corresponding to the ‘auto-

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<sup>282</sup> Martor op cit (n258) 30. A commerçant is any legal or natural person who puts goods into circulation or who provides any services with a profit motive – who engages in actes de commerce (commercial transactions). (Treaty, art 2, 3).

<sup>283</sup> Ibid at 29 (Treaty, art 1).

<sup>284</sup> Ibid at 30.

<sup>285</sup> Beauchard & Kodo op cit (n258) 36.

<sup>286</sup> Ibid at 37.

<sup>287</sup> Acte uniforme révisé portant au droit commercial general and Acte uniforme révisé portant organisation des sûretés, adopted 15 December 2010, effective 16 May 2011 (23 JO 15 February 2011) available at <http://www.ohada.com/actes-uniformes.html>. Both Acts were in force since 1 January 1998 under the 1993 Treaty.

entrepreneur' status introduced in France in 2008.<sup>288</sup> The *entreprenant*, who is a natural person only, is not obligated to register on the trade and personal property registry, but is only required to complete a simple declaration at no cost at the local court register (*greffe*).<sup>289</sup> When the revenues of the *entreprenant* exceed a specified amount, he or she must then perform all the formalities to operate as a commercial operator under the UA-GCL and must be fully registered.<sup>290</sup> It appears that there have been few registrations of *entreprenants* to date.<sup>291</sup> An innovation in the UA-ST was the pledge without dispossession on tangible assets, designed to use stock or any other means of production as collateral without depriving the grantor of the use of the pledged asset, which could provide much needed assistance to micro-enterprises in obtaining credit.<sup>292</sup> (The most significant change to OHADA laws in regard to the informal sector is the addition of a Uniform Act on Cooperative Societies, which is discussed in Chapter 4.)

### 3.2.1(a) Commercial Registry

The provisions relating to the trade and personal property credit registry (*Registre du Commerce et du Crédit Mobilier*, or RCCM) are of particular importance to the OHADA reform effort and perhaps the most significant instance of OHADA's ineffectiveness.<sup>293</sup> The principal function of the RCCM is to establish a centralised and computerised system of registration for commercial companies and operators and also for charges over

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<sup>288</sup> Beauchard & Kodo op cit (258) 33 (Treaty, art 30).

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> Hiez & Menétrey op cit (n280) 458. A major reason for lack of interest may be the lack of advantages associated with the status. The relative success of the auto-entrepreneur in France appears to be that an enrolled auto-entrepreneur is entitled to health coverage and retirement benefits which are not available in the OHADA region.

<sup>292</sup> Beauchard & Kodo op cit (n258) 37.

<sup>293</sup> Renaud Beauchard 'OHADA Nears the Twenty-Year Mark: An Assessment' in Hassane Cissé, Sam Muller, Chantal Thomas, and Chenguang Wang (eds) *The World Bank Legal Review, Volume 4: Legal Innovation and Empowerment for Development* (2013) 332.



movable property.<sup>294</sup> Centralisation of the data held in each local registry is to be organised in a national register held in each Member State and a regional register to be held by the CCJA.<sup>295</sup> The RCCM is a key institution in the development of lending and is closely linked with the UA-ST. Its purpose is to protect creditors and to provide businesses with important information for contracting purposes. A commercial entity acquires its separate legal personality only once it has been registered with the RCCM, which must be done within one month of establishing a business or incorporation, and failure to comply is a criminal offense.<sup>296</sup> Yet no commercial registry as contemplated under OHADA exists in any Member State.<sup>297</sup> Nor has any state created a proper vital records registry, which is essential for collateral registration.<sup>298</sup> The absence of electronic or computerised records at local court registries and at the RCCM along with the disparate civil status registers hamper the credit environment.<sup>299</sup> Making the RCCM operational is going to be a long term project, and it might prove to be an ‘illusory tool in the effort to increase legal certainty.’<sup>300</sup>

### 3.3 Legal Certainty

The foundational imperative of the OHADA reforms was the perceived need for legal and judicial certainty which, it was thought, could be obtained through a unified system of laws and legal institutions.<sup>301</sup> The idea is that this new legal certainty and

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<sup>294</sup> Martor op cit (n 258) 34. The RCCM registers charges over shares, businesses (fonds de commerce), stocks, professional equipment and motor vehicles, and also clauses providing for retention of title, details of leasing contracts, and various preferential rights. Id 35.

<sup>295</sup> Ibid (UA-GCL art 20)

<sup>296</sup> Martor op cit (n258) 35.

<sup>297</sup> Beauchard ‘An Assessment’ op cit (n293) 332.

<sup>298</sup> Ibid.

<sup>299</sup> Beauchard & Kodo op cit (n258) 24.

<sup>300</sup> Ibid at 25.

<sup>301</sup> Ibid at 6.

predictability would create an environment more conducive to foreign investment.<sup>302</sup> ‘As the drafters themselves expressed, the fact that these unified laws are based on Western legal norms reassures potential foreign investors.’<sup>303</sup> The underlying rationale for legal unification is that the diversity of laws in the region is itself the primary cause of this uncertainty and the main obstacle to trade and economic development.<sup>304</sup> There are several logical and empirical problems with this reasoning. First, it is a dubious proposition that the diversity of laws among Member States was the cause of these countries being poor or economically under-developed. Secondly, even if diversity of laws hinders development in some regard, what is needed is a better understanding of how diversity among specific laws is an impediment to particular aspects of development. Thirdly, by creating a new, unified regime another dimension of legal diversity or pluralism has been created or intensified. OHADA adds another layer of law – and thus uncertainty – due to the possible jurisdictional overlap between OHADA and the other regional institutions involved in rulemaking related to economic matters.<sup>305</sup> Fourthly, it is presumed that there are no benefits to legal pluralism and that legal pluralism can be eliminated. In any event, positing diversity of laws itself as the principle cause of underdevelopment is a weak, unsupported justification for such a massive and expensive legal reform as OHADA.

The present situation under OHADA may actually undermine more than promote legal certainty.<sup>306</sup> As has been noted (*supra* 1.5.3), transplanted institutions create greater

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<sup>302</sup> Charles Manga Fombad ‘Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond’ 59(3) *Africa Today* 51 at 55 (2013).

<sup>303</sup> Jean Alain Penda Matipé ‘Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa’ in Claire Moore Dickerson (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA 2ed* (2012) 21.

<sup>304</sup> Fombad *op cit* (n302) 55; Bamodu, Gbenga ‘Transnational Law, Unification and Harmonization of International Commercial Law in Africa’ (1994) 38(2) *J. Afr. L.* 125 at 128, 130.

<sup>305</sup> Beauchard & Kodo *op cit* (n258) 13, 15, 17. For an analysis of the interaction of overlapping regional laws, see Salvatore Mancuso ‘OHADA Report’ 1 *European Review of Private Law* 169 (2012).

<sup>306</sup> Isabelle Deschamps ‘Assessing the Organisation pour l’harmonisation en Afrique du droit des affaires’ Contributions to Poverty Reduction in Africa: A Grounded Outlook’ (2013) 6 (2) *Law and Development Review* 111.

legal uncertainty than do domestically developed solutions.<sup>307</sup> Moreover, the attempt to bring uniformity of laws within a state may actually be one of the principal causes of conflict among laws and not a solution.<sup>308</sup> The introduction of title registration systems to enhance property rights in Africa, for example, could result in greater uncertainty about those rights (supra 1.3.1).<sup>309</sup> Paquin found that the flexible nature of contracting and the frequency of contractual violations among micro-enterprises in Dakar are caused by the uncertainty in the local business environment, and that the inefficiency of legal institutions did not account for the little use made of formal law mechanisms in the resolution of business disputes.<sup>310</sup> Thus legal insecurity may have little to do with actual state of legal institutions.<sup>311</sup> The micro-operators in Senegal, where a high value is attached to negotiation and compromise, tend to interpret contractual obligations as ‘good faith best efforts.’<sup>312</sup>

#### 3.4 Failure of OHADA to Address the Informal Sector

Broadly speaking there are three types of challenges to law reform: 1) resource constraints, 2) cultural and social values, and 3) political economy issues.<sup>313</sup> OHADA is negatively impacted by all three challenges. This paper focuses on the second of these challenges. There are many well-documented reasons for the ineffectiveness of OHADA, which include incomplete implementation, low utilization, jurisdictional and enforcement issues, poor dissemination and accessibility, inadequate funding, and

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<sup>307</sup> Glenn op cit (n13) 55-56.

<sup>308</sup> Ibid at 54.

<sup>309</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 240.

<sup>310</sup> Paquin op cit (n46) 6, 126. (Findings based on qualitative data gathered from extensive interviews with thirty micro-operators in Dakar, focusing on their contracting practices and dispute resolution preferences.)

<sup>311</sup> Ibid. Of course, the impossibility of any system to recover money from insolvent or poor debtors must be a major factor. Id 117.

<sup>312</sup> Ibid at 124.

<sup>313</sup> Deschamps ‘Commercial Law Reform’ op cit (n194) 29.

language barriers.<sup>314</sup> While significant, these problems are primarily issues of political will and resource constraints.<sup>315</sup> The failure of OHADA to address the informal sector is a more fundamental problem that cannot be rectified by improvements in these other areas alone. The addition of the Uniform Act on Cooperative Societies in the 2008, some 15 years after the original 1993 Treaty, is the first major reform directed specifically to the needs and realities of the informal sector, and although significant, does not change the overall institutional bias of the OHADA regime. Lack of understanding of the informal sector is a source of confusion and mistakes about how the economy actually functions.<sup>316</sup> The focus on formalization downplays the role of the informal sector, which is often an economically productive one that can also provide security and reliability.<sup>317</sup> OHADA is tailored for the activities and structures of formal sector companies, and not those operating in the informal sector.<sup>318</sup> It is large, non-African companies, mostly French, who are the primary beneficiaries of the system.<sup>319</sup> OHADA law is inaccessible to most people and is ill-suited to the needs of African society, and its purported benefits are illusory.<sup>320</sup> It reflects rules and principles that are foreign or too abstract.<sup>321</sup> It fails to take into account the existing legal pluralism in the region. Except in a few limited situations, what OHADA offers is simply not relevant for micro-enterprises.<sup>322</sup> The Acts contain little evidence of any desire to integrate African norms

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<sup>314</sup> see Beauchard & Kodo op cit (n258) 16-32; Hiez & Menétrey op cit (n280) 444-448; Dickerson 'Perspectives on the Future' op cit (n269) 118-26.

<sup>315</sup> Beauchard 'An Assessment' op cit (n293) 330.

<sup>316</sup> Hiez & Menétrey op cit (n280) 451.

<sup>317</sup> Kennedy 'Laws and Developments' op cit (n44) 22.

<sup>318</sup> Deschamps 'Commercial Law Reform' op cit (n194) 53. A significant portion of officially registered companies are French which dominate segments of their target markets in the region, including energy, public works, distribution, transport, banking and related services, agro-industry and telecommunications.

<sup>319</sup> Hiez & Menétrey op cit (n280) 443, 450.

<sup>320</sup> Ibid at 441, 444, 448.

<sup>321</sup> Ibid at 443; Deschamps 'A Grounded Outlook' op cit (n306) 146.

<sup>322</sup> Claire Moore Dickerson 'OHADA on the Ground: Harmonizing Business Laws in Three Dimensions' (2010) 25 *Tul. Eur. & Civ. L.F.* 103 at 115.

or values.<sup>323</sup> Although some rules were adopted to the realities of the informal sector in the 2008 Treaty, such as the introduction of the *entreprenant*, little has been done to ensure that OHADA comprehensively addresses the challenges faced by micro-operators.<sup>324</sup> These are only piecemeal insertions whose application to those realities has yet to be seen.<sup>325</sup> Since OHADA law is not adapted to, and often conflicts with, their practices and needs, it is not surprising that micro-operators do not seek its application.<sup>326</sup> OHADA highlights the gap and frequent conflict between economic behaviour and normative conduct on the ground and the formal business law on the books.<sup>327</sup> This gap is widened by a strong and persisting oral tradition in the OHADA region.<sup>328</sup> The framers of OHADA apparently assumed that the social and political institutions necessary for law reform already existed or that they were not important.<sup>329</sup> In either case they were mistaken.

#### 3.4.1 Promoting Trade

OHADA also does little to promote intra-African trade.<sup>330</sup> To be fair, issues surrounding the existence of significant trade barriers in the region are outside OHADA's ambit. On the other hand, increased trade is one of its articulated objectives.<sup>331</sup> The only direct method OHADA offers for increasing trade is by way of increased certainty in private business transacting resulting from its unified laws. As a method of increasing trade it is

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<sup>323</sup> Deschamps 'A Grounded Outlook' op cit (n306) 111, 131-32. In fact, some African jurists even have an intense disregard for indigenous legal cultures. Id (fn85).

<sup>324</sup> Ibid at 146.

<sup>325</sup> Ibid at 132.

<sup>326</sup> Deschamps 'Commercial Law Reform' op cit (n194) 51.

<sup>327</sup> Ibid at 66.

<sup>328</sup> Beauchard and Kodo op cit (n258) 22.

<sup>329</sup> Beauchard 'An Assessment' op cit (n293) 333.

<sup>330</sup> Fombad op cit (n302) 67-68. Nor has regional integration in general done much to promote trade. Benjamin and Mbaye op cit (n133) 48.

<sup>331</sup> Dickerson 'OHADA Calls the Tune' op cit (n266) 20, 40.

doubtful that such enterprise level predictability, although important, could ever trump the problems caused by trade barriers or other political and macroeconomic issues.

#### 3.4.2 Traditional Business Practices and Customary Laws

OHADA reformers did not see any advantages to informal institutions in Africa as compared to formal law, and local customs were often thought to constitute impediments to the transformation of African society.<sup>332</sup> Customary law is generally limited to domains such as marriage, succession, and land law.<sup>333</sup> It is generally believed that customary laws are not geared to economic objectives, but only towards the preservation of the communal group and maintenance of peace.<sup>334</sup> There is little recognition of indigenous business models, and OHADA fails to account for the informal manner in which commerce is conducted in the region.<sup>335</sup> This failure seems particularly misguided or paradoxical since present day business practices and norms of micro-operators in the region are rooted in traditional norms and practices.<sup>336</sup> There is a prevailing presumption that commercial activity is necessarily and rightly a subject over which state law has a monopoly.<sup>337</sup> That presumption is an error. As was noted (*supra* 1.7) customary laws represent entire ways of life for most Africans, including their economic activities. Although customary laws and modern commercial laws occupy separate domains, the two cannot be divorced. Marital and succession laws can sometimes impact significantly on business matters as, for example, the consequence of divorce or death of key persons on the continuation or dissolution of closely-held or family-owned companies. A more inescapable connection between customary laws and modern business laws is the status of real property. For instance, under the UA-ST only a mortgage can serve as security

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<sup>332</sup> Paquin *op cit* (n46) 116-17.

<sup>333</sup> *Ibid* at 117.

<sup>334</sup> Bamodu *op cit* (n304) 127.

<sup>335</sup> Deschamps 'Commercial Law Reform' *op cit* (n194) 49, 50.

<sup>336</sup> *Ibid* at 45.

<sup>337</sup> Mancuso *op cit* (n113) 16.

over real property when less than five percent of the land in the region is registered.<sup>338</sup> The rights in real property in Africa are predominantly controlled by customary land tenure systems and largely remain untitled. Even if the land were to be titled in a standard manner, as a practical matter, the rights of the community in the land could effectively place a cloud over the title.<sup>339</sup> At the same time, the sudden introduction of title registration systems into contexts with recognised customary rules about property has significant social implications (supra 1.3.1).<sup>340</sup>

### 3.5 Development through OHADA

The concept of development ‘almost becomes a mockery’ in the circumstances that exist in African economies today.<sup>341</sup> There has been no ‘systematic attempt to deal with the crisis of African underdevelopment’ and Africa is becoming increasingly marginalised within the global economic system.<sup>342</sup> Only about 10 percent of the trade within Africa is intra-African, which is the lowest level of any region in the world.<sup>343</sup> Any economic growth has been ‘more affected by commodity prices than any improvement in institutional frameworks.’<sup>344</sup> For almost all OHADA countries, per capita national product is less than U.S. \$700 per year.<sup>345</sup> Given these realities, it is striking how little attention is given to development in the OHADA reforms, especially since economic development is purportedly the end goal. OHADA’s economic development strategy is still ‘haunted by colonial spirits’ in so much as it primarily serves French and other

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<sup>338</sup> Mancuso op cit (n113) 18 (UA-ST art 192).

<sup>339</sup> Tamanaha ‘Rule of Law’ op cit (n14) 11.

<sup>340</sup> Tamanaha ‘Primacy of Society’ op cit (n12) 240.

<sup>341</sup> Allott op cit (n1) 5.

<sup>342</sup> John M Luiz ‘The Wealth of Some and the Poverty of Sub Saharan Africa’ (2006) 33(9) *International Journal of Social Economics* 624 at 625, 638-39.

<sup>343</sup> Fombad op cit (n302) 55.

<sup>344</sup> Isanga op cit (n17) 62.

<sup>345</sup> Ibid at 66.

foreign interests and is based on Western norms.<sup>346</sup> Although often touted as pro-development, there is nothing in the Treaty or in the Acts that states that the goals of OHADA include the development of the people or countries in the region.<sup>347</sup> In fact, the term ‘development’ only appears once in the Treaty ambiguously as ‘centre of development.’<sup>348</sup> Whatever a ‘centre of development’ might mean, the concept does not support the rhetoric about economic development in Member States. There is no reference to anything demonstrating how these reforms might cause development to occur. Clearly development within the OHADA region takes a back seat to other objectives.<sup>349</sup> A December 2013 Report to the French Minister of Economy and Finance, for instance, notes that OHADA ‘is an undervalued shared asset, that once mastered, can offer France a strong and open advantage vis-à-vis “Anglo-Saxon” investors, as well as English-speaking and emerging Africans.’<sup>350</sup> The ultimate prize is foreign investment which, one is left to assume, definitely and automatically generates economic development.<sup>351</sup> The terms ‘foreign investment’ and ‘development’ are often conflated, and the casual connection from foreign investment to increased local development seems to be taken for granted. OHADA implicitly endorses the concept of ‘development-through-foreign investment,’ although there is little evidence to support it.<sup>352</sup> The premise that legal reform will necessarily increase foreign investment is contested as is the premise that foreign investment necessarily leads to local economic development.

### 3.5.1 Foreign Direct Investment

One pillar of law and development doctrine is the belief that improvements in the legal institutions in a host country will lead to an increase in the inflow of foreign direct

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<sup>346</sup> Deschamps ‘Commercial Law Reform’ op cit (n194) 59.

<sup>347</sup> Hiez & Menétrey op cit (n280) 440-41.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid at 441.

<sup>350</sup> Ibid at 443.

<sup>351</sup> Ibid at 441.

<sup>352</sup> Ibid at 442.



investment (FDI) into that country. This belief is based upon the theory that investors are attracted to states with effective legal systems – those which implement laws efficiently and predictably.<sup>353</sup> Underlying this theory is the assumption that economic actors structure their activities in order to reduce transaction costs, which are said to arise through the inefficient or unpredictable enforcement of laws.<sup>354</sup> Although this theory predicts that foreign investors *should* be attracted to states with effective legal systems there is little empirical evidence to suggest that they *are* so attracted.<sup>355</sup> The ability of a state to improve FDI inflows is likely constrained by the characteristics of investors, who may be ‘insensitive’ to the effectiveness of legal systems.<sup>356</sup> It appears that the nationality of an investor, the size of the investment, and whether an investor is export-oriented could be factors which determine the sensitivity of foreign investors to endogenous legal reform.<sup>357</sup> In addition, many economic actors depend upon mechanisms outside the formal legal system to structure and implement their economic activities, which might not be justifiable on a transaction cost analysis.<sup>358</sup> Whether FDI inflows would have a positive impact on development depends on other variables. Investment in relatively labour-intensive industries will likely lead to more job creation and local growth than investment in capital-intensive industries.<sup>359</sup> In Africa, the majority of FDI inflow has been in the capital-intensive, extractive sector, so it is unlikely to have significant impact on employment generally and in the informal sector in

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<sup>353</sup> Amanda Perry ‘Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence’ (2000) 49 *Int’l & Comp. L.Q.* 779 at 782. (‘Legal reform in the absence of more information may be as likely to produce net costs, as it is to produce net benefits.’ Id 799.)

<sup>354</sup> Ibid at 782-783. Predictability is best ensured where laws are stable, accessible and clear. Transaction costs are all those costs associated with undertaking any transaction – search, information, bargaining, and enforcement costs. Legal systems sometimes impose additional costs.

<sup>355</sup> Ibid at 783-84.

<sup>356</sup> Ibid at 798.

<sup>357</sup> Ibid at 792-96.

<sup>358</sup> Ibid at 788-90.

<sup>359</sup> Verick op cit (165) 13.

particular.<sup>360</sup> Another variable is the type of subcontracting or other linkages the investment will have in either the formal or informal sector. If the investment requires linkages with local suppliers, for instance, then FDI could have a positive impact.<sup>361</sup>

### 3.5.2 Impact Studies

No comprehensive study has been carried out to date on the impact of OHADA law on economic development or investment in the region.<sup>362</sup> There does not appear to be any empirical evidence that OHADA has had any beneficial effect on the economies of the Member States.<sup>363</sup> But there is data to suggest that there has been no positive impact. The results of one quantitative study about the effects of OHADA on growth and development were sobering.<sup>364</sup> The author concluded that OHADA member states did not perform better overall than non-member states in the post-implementation period.<sup>365</sup> A legal case study indicates that OHADA formal laws do not have a significant impact on entrepreneurs in Cameroon.<sup>366</sup> Based on her research in the region, Deschamps concludes that OHADA laws ‘have either little, none, or adverse effects’ on the micro-

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<sup>360</sup> Verick op cit (165) 13.

<sup>361</sup> Ibid.

<sup>362</sup> Deschamps ‘Commercial Law Reform’ op cit (n194) 61.

<sup>363</sup> Beauchard ‘An Assessment’ op cit (n293) 323. (Note: There is a reference to a ‘recently conducted economic impact study’ in a message from the Permanent Secretary on 19 October 2015 on the occasion of the 22<sup>nd</sup> anniversary of OHADA, available at <https://www.facebook.com/OfficialOhada/posts/908009999283097>, accessed on 22 September 2016. The post claimed that average annual growth rate in member states increased from 2.74 per cent in the period 1985-1997 to 4.2 per cent in the period 1998-2011. However, no reference or links to the study were provided and no such document or publication could be located.)

<sup>364</sup> Alexa Tiemann ‘OHADA Membership and Business Reforms: A Driver for Growth?’ (2012) 6-7, 16 (econometric study based on cross-country panel data from several sources of 53 African countries, 16 of which are OHADA members, for the time period 1971 to 2010), available at [http://colloquedial.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146\\_US\\_Tiemann.pdf](http://colloquedial.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf), accessed on 10 July 2015.

<sup>365</sup> Ibid.

<sup>366</sup> Claire Moore Dickerson ‘Bringing Formal Business Laws to Cameroon’s Informal Sector: Lessons and Cautions from the Tax Law Example’ (2014) 13 *Wash. U. Global Stud. L. Rev* 265 at 267 (pilot study of twenty entrepreneurs in five markets in Cameroon), available at [http://openscholarship.wustl.edu/law\\_globalstudies/vol13/iss2/6](http://openscholarship.wustl.edu/law_globalstudies/vol13/iss2/6), accessed on 10 September 2015.

operators in the region.’<sup>367</sup> The annual ‘Doing Business Report,’ published since 2004 by the World Bank, is sometimes cited as evidence of the success of OHADA, but the Report is very narrow in scope and only tangentially relates to OHADA reforms, comparing sub-Saharan Africa as whole to other global regions.<sup>368</sup>

### 3.6 Recommendations: A Functional Approach

Enterprises in more developed economies generally benefit from legal structures in all phases of the business life-cycle, as well as from non-legal support structures, such as transportation, communications, electricity, and sanitation.<sup>369</sup> Such cumulative and complementary assistance undergirds the economy in more developed countries and provides predictability, but is often overlooked or taken for granted in analysing the role of law in facilitating business.<sup>370</sup> The challenge is to determine how similar structures could help micro-enterprises obtain functionally equivalent support in the African context. It is the functionality (not necessarily the form) of these laws and structures that African countries need to replicate in their own economies.<sup>371</sup> A functional approach to law reform is focused on outcomes rather than process and formality, shifting the emphasis from standardisation of mechanisms to functionality, responsiveness, and adaptability.<sup>372</sup>

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<sup>367</sup> Deschamps ‘A Grounded Outlook’ op cit (n306) 111-12. (Findings based on interviews with 110 stakeholders conducted in 2011 and 2012 in several cities in Benin, Cameroon, and Cote d’Ivoire, including 80 female entrepreneurs, lawyers, businessman, OHADA agents, clerks, and others. Id 115(fn11).

<sup>368</sup> World Bank ‘Doing Business 2016: Measuring Regulatory Quality and Efficiency’ (2016) 19-22, available at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>, accessed on 13 April 2016. The Report’s methodology is based on standardised cases with very specific, limiting assumptions. The key consideration is ensuring global comparability of the data; development and the informal sector are not addressed. OHADA is mentioned in the Report at 39-41.

<sup>369</sup> Dickerson ‘Functional Understanding’ op cit (n245) 187-88.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid. The relevant law extends beyond classic business law, and non-business law ensures basic physical security of persons and property.

<sup>372</sup> Milhaupt op cit (n61) 844.

OHADA has so far succeeded in doing little more than modernising and unifying (mostly on the books only) disparate national laws from countries operating historically with the same (French) legal system.<sup>373</sup> It has not been shown to be successful in promoting micro-enterprise activity or alleviating poverty in Member States. Contrary to its stated objective to be ‘adaptable’ to the economic realities of the region, OHADA, as a whole, is not adapted to the reality of the informal sector. While foreign investment is an essential source of funds, a fundamental change in social institutions to encourage domestic economic development is equally critical.<sup>374</sup> What is needed is a pluralistic legal framework – not a positivist approach – that is responsive to the needs of micro-enterprises. In some matters the formal law should defer to local informal law. Further reforms need to include the interests of those who were previously marginalised in the formulation and administration of existing policies and institutions.<sup>375</sup> Model laws or legislative guides might be more appropriate tools in future reforms.<sup>376</sup> OHADA constituents must be more broadly and inclusively conceived of and attended to, and the highly diverse and socially-oriented nature of African people and societies must be taken into consideration.<sup>377</sup> The objective should be to promote needs-based commercial law reform in the region that is attuned to local practices and that allows citizens to play a more effective part in their own development and to best effectuate the human agency function.<sup>378</sup> Facilitating the operation of local businesses would lead to more successful sustainable development.<sup>379</sup> Micro-enterprises need access to credit, to subcontracting links with the formal sector, and to export markets. The creation of reliable and well-

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<sup>373</sup> Fombad op cit (n302) 70.

<sup>374</sup> OHADA Calls the Tune op cit (n266) 29.

<sup>375</sup> Prado & Trebilcock op cit (n102) 369.

<sup>376</sup> Deschamps ‘A Grounded Outlook’ op cit (n306) 124.

<sup>377</sup> Beauchard ‘An Assessment’ op cit (n293) 325; Vanderlinden op cit (n19) 1057.

<sup>378</sup> Deschamps ‘Commercial Law Reform’ op cit (n194) 60. The author calls her approach ‘clinical legal pluralist’ which aims to reconcile the formal with the informal rather than integrate the latter into the former. Id 34 (fn 38).

<sup>379</sup> Deschamps ‘A Grounded Outlook’ op cit (n306) 113.

functioning commercial registries would be a good step in providing the accurate information about operators or enterprises that is needed for firms to initiate relationships and to properly assess transactional risk.<sup>380</sup> The disadvantages stemming from the limited size of the local market and limited access to a larger pool of partners could be reduced by facilitating access to foreign and regional markets through the establishment of collaborative partnerships between local or regional micro-enterprises and foreign firms.<sup>381</sup> Associations and networks that help micro-operators develop their capacities and also to better understand formal laws could be promoted or at least allowed to form and operate without undue interference. The intent is to build bridges between the formal and informal and have a 'composite law' that is well-suited to African realities.<sup>382</sup>

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<sup>380</sup> Paquin op cit (n46) 127.

<sup>381</sup> Ibid.

<sup>382</sup> Hiez & Menétrey op cit (n280) 438, 460.

## CHAPTER FOUR – LINKING OHADA AND THE INFORMAL SECTOR

### 4.1 Mediation

Another area where OHADA missed an opportunity to reflect African values was in the selection of arbitration as the sole alternative dispute resolution (ADR) mechanism to the exclusion of mediation. As many as 90 percent of day-to-day disputes are said to be resolved through non-state systems such as traditional authorities.<sup>383</sup> The most common conclusion in legal research is that the dysfunction of the courts themselves causes there to be so little recourse to formal dispute mechanisms, but another possibility is that the methods being imposed do not fit with local realities and traditional practices.<sup>384</sup> The essential role of courts is to provide effective dispute resolution fora for constituents, but OHADA fails in this role. Arbitration under OHADA is designed for large commercial enterprises. It is not really suitable for most Africans and micro-operators. The arbitration process is impersonal and removed from people's experiences and communities – culturally and geographically. Traditional tribunals draw upon local, customary norms rather than state norms to resolve disputes and usually strive to reach consensual outcomes.<sup>385</sup> Traditional dispute resolution mechanisms are more locally based, as is formal mediation. Mediation is less formal, less expensive, and is more flexible than arbitration. In the mediation process, as in traditional African dispute resolution processes, when conflicts are resolved they are ultimately settled by agreement between or among parties. Mediators, likely experienced or respected members of the local communities, facilitate the process and nudge parties toward an agreement, but they don't impose a solution as does an arbitrator or arbitration panel. And intermediation by attorneys would not be required in mediation as it is under OHADA arbitration. By incorporating mediation into OHADA judicial reform, local actors would be involved,

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<sup>383</sup> Laure-Helen Piron 'Time to Learn to Act in Africa' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 291.

<sup>384</sup> Hiez & Menétrey op cit (n280) 450.

<sup>385</sup> Tamanaha 'Primacy of Society' op cit (n12) 224.

and thus settlements more likely to be respected. In this way, the judicial process would be more integrated into the daily lives of informal sector actors. With mediated settlement agreements there is – theoretically, if not practically – enforcement recourse to the courts if necessary. But this is different than an arbitral award which is imposed and enforceable as judgment. In mediation the parties are not forced to settle, nor is a judgment (award) imposed on them as in arbitration. The essential feature of a mediated settlement agreement, as with results under customary law tribunals, is that it represents an acceptable rule for the situation at hand in the minds of all participants so that a common feeling of justice prevails.<sup>386</sup> Mediation is ultimately about conciliation of competing demands. By omitting the conciliatory process and nature of mediation, OHADA fails to allow for the development of human agency through local stakeholder participation. Conciliation of disputes and conflicts over competing interests is a necessary step in the development of people's capacity to govern themselves. The process and mechanics of the OHADA arbitration process sterilises that important work. This is an instance where the OHADA legal reforms should have been more attuned to customary law and practices. Mediation could be incorporated into the OHADA regime consistent with local or customary norms. Formal mediation could be built upon or complement traditional dispute resolutions mechanisms and local tribunals. If the mediation process were formalised and adopted by local constituents it might also improve the reception of other OHADA laws. It would be a bridge between OHADA and the informal sector.

#### 4.2 Corporate Social Responsibility

OHADA formal law could reach the informal sector if it incorporated into its norms a conception of corporate social responsibility (CSR) based on a stakeholder theory in corporate law and governance. According to the evolving stakeholder theory, a company must consider a range of interests, and not only the shareholders (owners), in its decision-

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<sup>386</sup> Vanderlinden op cit (n19) 1053, 1061.

making and its business operations.<sup>387</sup> If a broad conception of CSR were adopted and integrated into OHADA law, larger formal enterprises might be required to address local conditions and institutions and to contribute to sustainable economic and social development.<sup>388</sup> The United Nations, for instance, encourages regional organizations such as OHADA to introduce the necessary institutional and legal mechanisms to promote the adoption of CSR practices by enterprises in regard to sustainable development.<sup>389</sup> One such mechanism would be for the Conference of Heads of State and of Government or the Council of Ministers to implement CSR provisions supplemental to business laws or to adopt a charter with CSR guidelines for the OHADA region.<sup>390</sup> The basis for a robust conception of CSR may already exist, however, under OHADA corporate law in the concept of *intérêt social*.

#### 4.2.1 *Intérêt Social*

Under French law, the goal of the corporation is to respect the *intérêt social* (translated as ‘social interest’ or ‘corporate interest’), which is a flexible, stakeholder-oriented conception of corporate governance.<sup>391</sup> The majority view is that corporate interest is expansive and includes all the interests of the corporation as a whole, even the interests of third parties that have contracted with the corporation, including employees, creditors, suppliers, and customers.<sup>392</sup> The concept was already present in the French corporate law that existed in the region before OHADA, and OHADA appears to have adopted the stakeholder oriented conception of corporate interest.<sup>393</sup> If this conception were to be

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<sup>387</sup> Karounga Diawara and Sophie Lavallée ‘Corporate Social Responsibility (CSR) in the OHADA Law’ 2 *Journal of Business Law and Ethics* 39 at 52-53 (2014).

<sup>388</sup> *Ibid.*

<sup>389</sup> *Ibid* at 54.

<sup>390</sup> *Ibid* at 56.

<sup>391</sup> Dickerson ‘OHADA Calls the Tune’ *op cit* (n266) 44 (as distinguished from the concept of shareholder primacy dominant in the United States).

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid* at 45. There is not enough jurisprudence yet under OHADA to know whether an expansive view of corporate interest will be embraced.



fully embraced, OHADA norms of CSR could include affirmative obligations to provide various services to those whom its operations affect, including those operating in the informal sector.<sup>394</sup> Corporate interest would then require balancing the perceived needs of potential investors with the interests of the citizens and local communities in the region.<sup>395</sup> An expansive concept of corporate interest would be consistent with OHADA's purported aim to enhance the region's development. Moreover, a concept of corporate interest (or CSR) that values the entire community would be consistent with traditional African norms and customs.

#### 4.3 Pro-Development Formal Law

Legal systems can be distinguished by the function law plays in support of economic activity.<sup>396</sup> The clear allocation and protection of property rights is only one possible function.<sup>397</sup> Another is the coordinating function of law where the focus is on the designation of actors with a right to participate in processes in which rights will be affected.<sup>398</sup> According to Milhaupt, the 'protective' and 'coordinative' functions of law coexist, and the dominance of one or the other distinguishes legal systems.<sup>399</sup> As we saw in Chapter 3, OHADA laws are focused on the protective function. This chapter looks at how OHADA could play a coordinative function. Dickerson argues that formal laws can be pro-development within the informal sector if they (1) impose 'function-enhancing obligations' on formal-sector actors who interact with micro-enterprises in the informal sector, and (2) 'facilitate coordinative behaviour' among informal sector actors in a

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<sup>394</sup> Dickerson 'OHADA Calls the Tune' op cit (n266) 45.

<sup>395</sup> Ibid.

<sup>396</sup> Milhaupt op cit (n61) 836.

<sup>397</sup> Ibid at 837. In such 'protective' systems, the legal system devotes most attention to creation of substantive legal rights and their enforcement through legal and judicial processes. Id at 843.

<sup>398</sup> Ibid 837. The German system of co-determination is an example of the 'coordinative' approach to economic governance. Co-determination is the legal requirement that large German firms provide half the seats on the Supervisory Board to employee representatives (fn 14).

<sup>399</sup> Ibid at 838.

manner compatible with pre-existing norms.<sup>400</sup> These two roles are separate but related. If coordination among micro-enterprises is facilitated, they are then in a position to make more credible demands on formal sector actors or government agents. At the same time, micro-operators who are the beneficiaries of obligations imposed on formal sector actors, will likely be in a better position to organise and coordinate their own efforts.

#### 4.3.1 Function enhancing obligations

Some of these sorts of ‘function-enhancing obligations’ could be derived from an expansive concept of corporate social responsibility (supra 4.2). Function-enhancing obligations would have to be imposed on government agents or private, formal sector actors. One example could be the provision of a standardised commercial lease for micro-enterprises for stalls or other space, which might also contain terms requiring basic sanitation, water, and electricity.<sup>401</sup> Such a standardised lease could reduce the costs of entering into lease agreements and possibly minimizing subsequent disputes.<sup>402</sup> In addition, regulations at the state or local level could require decent workspace for street traders and vendors, both in terms of permanence, storage facilities, and location desirability.<sup>403</sup> Another benefit of the provision of these basic support structures or function-enhancing obligations is that micro-enterprises would then need less capital.<sup>404</sup>

#### 4.3.2 Facilitating Coordinative Behaviour

Formal law can play a coordinative role by supporting existing informal networks and associations and by facilitating the creation and support of formal cooperatives.<sup>405</sup>

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<sup>400</sup> Dickerson ‘Functional Understanding’ op cit (n245) 183-84.

<sup>401</sup> Dickerson ‘OHADA on the Ground’ op cit (n322) 116-17.

<sup>402</sup> Ibid.

<sup>403</sup> Dickerson ‘Functional Understanding’ op cit (n245) 215

<sup>404</sup> Ibid at 210.

<sup>405</sup> Ibid at 214.

Cooperatives have great potential for coordinating self-help action.<sup>406</sup> Cooperative structure tracks local networking norms and is consistent with the principle of subsidiarity.<sup>407</sup> The creation of a strong, autonomous cooperative sector would be a catalyst to the coordinative role of formal law. OHADA formal law provides such a vehicle in the Uniform Act on Cooperative Societies (UA-CS).<sup>408</sup>

#### 4.4 Uniform Act on Cooperative Societies

In 2002, the International Labour Conference of the ILO adopted the Promotion of Cooperatives Recommendation (No. 193), a set of non-binding guidelines which provides a modern framework for cooperatives.<sup>409</sup> The Recommendation incorporates the 1995 International Statement of Cooperative Identity and the cooperative principles of the International Co-operative Alliance (ICA).<sup>410</sup> Since its adoption, over 100 countries have used Recommendation No. 193 to revise and develop their cooperative policies and laws, and it was followed in the creation of the UA-CS.<sup>411</sup> Cooperative are based on the values of self-help, individual-responsibility, democracy, equality, equity, and solidarity.<sup>412</sup> The core principles of cooperatives are:

1. Voluntary, open membership;
2. Democratic member control
3. Member economic participation

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<sup>406</sup> Randall E Torgerson, Bruce J Reynolds, and Thomas W Gray 'Evolution of Cooperative Thought, Theory, and Purpose' (1998) 13 *Journal of Cooperatives* 1 at 14.

<sup>407</sup> Dickerson 'Functional Understanding' op cit (n245) 214.

<sup>408</sup> Acte uniforme relatif au droit des sociétés coopératives, adopted 15 December 2010, entered into force 15 May 2011, with a transition period to 15 May 2013 (art. 396).

<sup>409</sup> Stirling Smith *Promoting Cooperatives: An Information Guide to ILO Recommendation No. 193* (2014) 3, 19 available at <http://www.ilo.org/publns>, accessed on 10 September 2015.

<sup>410</sup> Ibid. The ICA is a non-profit, non-governmental international association established in 1895 to advance the cooperative social enterprise model, and is the apex organisation for cooperatives worldwide. <http://ica.coop/en/international-co-operative-alliance>.

<sup>411</sup> Ibid at 26, 27.

<sup>412</sup> U.S. Overseas Cooperative Development Council (OCDC) *Cooperatives: Pathways to Economic, Democratic and Social Development in the Global Economy* (2007) 6, available at <http://www.coopdevelopmentcenter.coop>, accessed on 10 July 2015.

4. Autonomy and Independence
5. Education, Training and Information
6. Cooperation among Cooperatives
7. Concern for the Community<sup>413</sup>

The UA-CS deals only with the structure and general governance of the cooperative and not specific rules regarding the activities of the cooperatives.<sup>414</sup> The Act emphasises the notion of a ‘common bond’ shared by co-operators related to a profession, an identity of purpose, an activity, or legal form.<sup>415</sup> If the activity of the cooperatives requires a grant of authorisation from a regulatory body, then that activity is governed by the applicable rules of the authorising agency.<sup>416</sup> However, banking and financial cooperatives’ activities are explicitly made subject to national and regional laws.<sup>417</sup> The Act grants ample freedom to co-operators in establishing by-laws and the flexibility to allow cooperatives to incorporate local or national traditions that fit with the concrete needs of the specific population.<sup>418</sup>

The definition of a cooperative is taken directly from Recommendation 193:

... an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise according to the cooperative principles.<sup>419</sup>

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<sup>413</sup> OCDC op cit (n412) 6.

<sup>414</sup> David Hiez and Willy Tadjudje ‘The OHADA Cooperative Regulation’ in Dante Cracogna, Antonio Fici, and Hagen Henry *International Handbook of Cooperative Law* (2013) 94, 96. (parenthetical references below are to articles of the UA-CS).

<sup>415</sup> Ibid at 99 (art 8).

<sup>416</sup> David Hiez and Willy Tadjudje ‘Presentation of the New OHADA Law on Cooperatives’ (2012) 4 (UA-CS art 5, 20), available at [http://www.recma.org/sites/default/files/new\\_ohada\\_cooperative\\_law.pdf](http://www.recma.org/sites/default/files/new_ohada_cooperative_law.pdf), accessed on 10 September 2015.

<sup>417</sup> Hiez and Tadjudje op cit n414) 96 (art 2).

<sup>418</sup> Ibid at 110-111 (art 18).

<sup>419</sup> Hiez and Tadjudje ‘Presentation’ op cit (n416) 4 (UA-CS art 4).

An entity could be a ‘cooperative’ as defined above without technically being a ‘cooperative society’ in accordance with the UA-CS. The seven ICA cooperative principles listed above are restated in the UA-CS, and the principles must be included in the by-laws along with the agreement of the members to comply with them.<sup>420</sup> Each co-operator has one vote regardless of the size of her shareholding or starting date of her membership.<sup>421</sup> Under the Act, cooperatives are comprised of three bodies: a general meeting, a management body (committee or board of directors), and a supervisory committee or supervisory board.<sup>422</sup> The general meeting, which includes all co-operators, is the decision-making body, and its decisions are recorded.<sup>423</sup> Any person wishing to join a cooperative must apply in writing and be approved by the general meeting.<sup>424</sup>

The UA-CS creates two kinds of cooperative companies: a simplified cooperative and cooperative with a board of directors.<sup>425</sup> The cooperative only obtains its juristic personality after it has been registered with a Register for Cooperatives (based on the model of the RCCM), which must be done within one month of incorporation.<sup>426</sup> Share capital is the contribution made by co-operators which can be in cash, in kind, or in industry, and is reimbursed when a member leaves the cooperative, usually at a nominal value.<sup>427</sup> Cooperatives must establish a general reserve and a reserve for training and education on cooperative principles, which are not distributable.<sup>428</sup> Payment of patronage refunds can only be considered

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<sup>420</sup> Hiez & Tadjudge op cit (n414) 95-96 (UA-CS art 6, 18).

<sup>421</sup> Ibid at 101 (art 102).

<sup>422</sup> Ibid at 101-02 (art 223, 260).

<sup>423</sup> Ibid (art 242, 251, 104, 105).

<sup>424</sup> Ibid at 99 (UA-CS art 10). Discrimination is forbidden, but co-operators can be excluded for specified reasons, including lack of faithfulness to the cooperative (UA-CS art 6, 13).

<sup>425</sup> Ibid at 96. Board members can be individuals or legal persons. Id 102 (art 295).

<sup>426</sup> Ibid at 98 (art. 75, 154).

<sup>427</sup> Hiez and Tadjudge ‘Presentation’ op cit (n416) 9, 11 (art 11).

<sup>428</sup> Hiez & Tadjudge op cit (n414) 100-01 (art 114).

after the legal reserves are established.<sup>429</sup>

Mergers can only occur between cooperatives either by creating a new cooperative or through absorption.<sup>430</sup> Cooperatives can be converted from one type of cooperative (simplified or with a board) to the other only without having to change the cooperative legal form.<sup>431</sup> A conversion from a cooperative to another corporate form requires the dissolution of the existing cooperative and the creation of a new legal entity.<sup>432</sup> The reserves of the cooperative remain non-distributable.<sup>433</sup> The causes of dissolution are much the same as under company law.<sup>434</sup> However, upon liquidation, the assets of the cooperative must be allocated to other cooperatives, institutions, or organisations working to promote the cooperative movement.<sup>435</sup>

Cooperatives can be integrated into umbrella cooperatives at three different levels: unions (two or more cooperatives), federations (two or more unions), and confederations (two or more confederations).<sup>436</sup> These umbrella organisations function much like primary cooperatives and, in the absence of specific provisions, are governed by the same general rules as cooperatives with boards of directors.<sup>437</sup> UA-CS has established a new level of integration – ‘cooperative networks of resources and objectives’ – which can operate transnationally to implement any means to facilitate, improve, or develop the activity of their members or to promote cooperative principles.<sup>438</sup>

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<sup>429</sup> Hiez & Tadjudge op cit (n414) 101 (art 112).

<sup>430</sup> Ibid at 103 (art 176).

<sup>431</sup> Ibid at 105 (art 167).

<sup>432</sup> Ibid (art 168).

<sup>433</sup> Ibid.

<sup>434</sup> Ibid at 106 (art 177).

<sup>435</sup> Ibid at 107 (art 196).

<sup>436</sup> Ibid at 103 (art 133, 141, 155).

<sup>437</sup> Ibid at 104 (art 140, 150, 159).

<sup>438</sup> Ibid at 104 (réseaux coopératifs de moyens d’objectifs, art 160).

There remains a problem regarding other organisations that resemble cooperatives (e.g. mutual societies, tontines, rural associations) and that might be regulated under national laws but which are not qualified technically as cooperatives under UA-CA.<sup>439</sup> This raises question regarding the abrogation of national laws governing these institutions and whether these other institutions can or must be converted to formally compliant cooperatives.<sup>440</sup> Another problem is the creation of a functioning Register for Cooperatives, which suffers from the same issues as the does the establishment of the RCCM (supra 3.2.1a), namely, it doesn't exist.<sup>441</sup> This is all complicated by the fact that any person who uses the legal form of a cooperative must comply with the UA-CS, subject to criminal liability for failing to do so.<sup>442</sup>

#### 4.5 Scope and Characteristics of Cooperatives

Cooperatives are significant economic force in nearly every developed country and have been major contributors to economic growth and poverty alleviation.<sup>443</sup> In many countries cooperatives are among the largest enterprises in diverse fields, including agriculture, savings and credit, rural electricity, insurance, housing, and renewable energy.<sup>444</sup> Membership in cooperatives is estimated to be nearly one billion with another 100 million directly employed by cooperatives, and 2,000 cooperatives in 56 countries have a total turnover of US\$ 2,578.5 billion.<sup>445</sup> There are three times as many member-owners as there are individual shareholders in investor-owned enterprises worldwide.<sup>446</sup> Unfortunately, results have been much less impressive in less-developed

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<sup>439</sup> Hiez & Tadjudge op cit (n414) 107.

<sup>440</sup> Ibid 108.

<sup>441</sup> Hiez & Menétrey op cit (n280) 445-46. Only the Republic of Gabon has actually adopted the regulatory measures necessary to operate such a registry. Id 446.

<sup>442</sup> Hiez & Tadjudge op cit (n414) 107 (UA-CS art 386).

<sup>443</sup> OCDC op cit (n412) 6.

<sup>444</sup> Ibid at iii.

<sup>445</sup> Smith op cit (n409) 22.

countries.<sup>447</sup>

The cooperative is a distinctly modern form of business, not a peripheral or culturally limited form of organisation.<sup>448</sup> Cooperatives are commonly much more closely controlled by their member-owners than are investor-owned firms, but control in a cooperative is broadly diffused among its members.<sup>449</sup> A cooperative is generally dependent on economies of scale.<sup>450</sup> Ownership of a cooperative is rarely shared by a group of patrons that exhibits any substantial diversity because the costs of collective decision-making are very high for a heterogeneous group of owners.<sup>451</sup> Cooperative philosophy emphasises local responsiveness, decentralised decision making, participation and involvement, and local generation and distribution of wealth.<sup>452</sup> The essential characteristic of a cooperative is that it is a democratic organization providing goods and services in the market place with the purpose of bringing sustainable prosperity to its members.<sup>453</sup> Cooperatives are locally created and embedded voluntary and participatory associations whose members share a group identity and rely on local capital mobilization.<sup>454</sup> Ownership and control by members is a key aspect of cooperatives

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<sup>446</sup> Anup Dash 'Building Smart Cooperatives for the 21<sup>st</sup> Century' in Bruno Roelants (ed) *Cooperative Growth for the 21<sup>st</sup> Century* (2013) 42 available at [http://ica.coop/sites/default/files/media\\_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf](http://ica.coop/sites/default/files/media_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf), accessed on 10 July 2015.

<sup>447</sup> Ibid.

<sup>448</sup> Henry Hansmann, 'Cooperative Firms in Theory and Practice' *LTA* 4/99 387. Available at <http://www.law.yale.edu/documents/pdf/Faculty/Hansmanncooperativefirms.pdf>, accessed on 10 July 2015. Cooperatives developed only in the late nineteenth century, well after investor-owned firms.

<sup>449</sup> Ibid at 398.

<sup>450</sup> Ibid at 399.

<sup>451</sup> Hansmann op cit (n448) 395. 'Patrons' refers to all persons (individuals or other firms) who transact with a cooperative, either as purchasers of its products and services or as suppliers of some factor of production (capital, labour, or materials).

<sup>452</sup> Torgerson, Reynolds & Gray op cit (n406) 9.

<sup>453</sup> Smith op cit (n409) 19.

<sup>454</sup> Patrick Develtere and Ignace Pollet 'Renaissance of African Cooperatives in the 21<sup>st</sup> Century: Lessons from the Field' in Patrick Develtere, Ignace Pollet, and Fredrick Wanyama (eds) *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (2008) 61- 62.



and members are the prime beneficiaries of the cooperative enterprise.<sup>455</sup> Cooperatives differ from other forms of commercial enterprise in that their owners invest in order to create a business that will benefit them through their patronage, not from a return on their equity.<sup>456</sup> Surplus revenues are returned to members proportionate to their trade with the cooperative (patronage refunds), reinvested in the cooperative, or used to provide additional member services.<sup>457</sup>

Most cooperatives in Africa are related to agricultural activities, but savings and credit cooperatives are the second largest and fastest growing cooperative sector and may be the predominant form of micro-finance institution in Africa.<sup>458</sup> Established cooperatives often expand into ancillary services directly related to the core business of the cooperative, such as storage and packaging, and some seek expansion into the fields of insurance, credit, education and training, or medical services.<sup>459</sup> In addition to the more traditional producer, worker, and consumer cooperatives, the range of areas covered by cooperatives in Africa includes housing, transport, tourism, recreation, basic infrastructure, mining, and handicrafts and other cottage industries.<sup>460</sup> Cooperatives are often linked to social movements focused on poverty alleviation, social justice, and environmental issues.<sup>461</sup> Participation in the Fair Trade Movement provides small producers an opportunity to participate in the global economy, especially trade in coffee, cocoa, cotton, and organic produce.<sup>462</sup> Cooperatives can also take advantage of intellectual property, particularly trademarks on their products.<sup>463</sup>

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<sup>455</sup> OCDC op cit (n412) 3-4.

<sup>456</sup> Ibid.

<sup>457</sup> Smith op cit (n409) 19.

<sup>458</sup> Develtere & Pollet op cit (n454) 53.

<sup>459</sup> Ibid.

<sup>460</sup> Ibid at 54-55.

<sup>461</sup> OCDC op cit (n412) 18.

<sup>462</sup> OCDC op cit (n412) 29.

<sup>463</sup> Dickerson 'Functional Understanding' op cit (n245) 212.

#### 4.5.1 Cooperatives and Traditional Institutions

Modern cooperatives are similar to organisations of community and solidarity in Africa rooted in traditional social hierarchies, such as village associations and tontines, and they work best when the norms and values they rely on are congruent with those traditional systems.<sup>464</sup> Unlike the modern cooperative form, however, these traditional systems do not have built-in mechanisms for expansion or growth and in most cases are event or hazard related and mobilised only on an ad hoc basis.<sup>465</sup> The cooperative form provides a new framework that reinforces and complements these traditional mutual support institutions.<sup>466</sup> Cooperatives often create ancillary mechanisms to handle expenses related to wedding, illness, death or funerals that are similar to the solidarity mechanisms common to most African communities.<sup>467</sup>

#### 4.5.2 Development through Cooperatives

Cooperatives build social capital, which consists of all those aspects of social organization (institutions, relationships, attitudes, norms, and values) which govern and shape interactions and facilitate cooperation amongst the members of a community.<sup>468</sup> Cooperatives bring critical social services to their communities, generate economies of scale, increase efficiencies and access to information, improve the quality and value added to products, increase access to capital, and create bargaining power or leverage.<sup>469</sup> Cooperatives instil democratic values through member control, participatory management, devolution of power, self-reliance, and collective action, and they also provide opportunities for improvement of conflict

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<sup>464</sup> Patrick Develtere 'Cooperative Development in Africa up to the 1990s' in Patrick Develtere, Ignace Pollet, and Fredrick Wanyama (eds) *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (2008) 2.

<sup>465</sup> Ibid.

<sup>466</sup> Develtere & Pollet op cit (n454) 75.

<sup>467</sup> Ibid.

<sup>468</sup> Davis & Trebilcock op cit (n45) 929.

<sup>469</sup> OCDC op cit (n412) 8-9.

management skills, all of which can contribute to the enhancement of civil society.<sup>470</sup> Cooperatives can offer these advantages whether or not they are incorporated under formal law. However, eventual formalization would be desirable for cooperatives to grow and remain sustainable.

Transformational development (the enhancement of human capability) requires fundamental changes in economic structures, governance, and institutions.<sup>471</sup> The wealth generation and social inclusion that cooperatives help foster is critical for transformational development.<sup>472</sup> Cooperatives are ‘the only form of organization meeting so fully all the dimensions of poverty alleviation as summarised by the World Bank: opportunity; empowerment and security.’<sup>473</sup> Cooperatives contribute to transformational development through three primary pathways: economic (alleviating poverty, stimulating economic growth); democratic (providing a framework for democratic participation); and, social (building social capital and trust).<sup>474</sup> ‘Cooperatives represent one of the few options that [micro-enterprises] have for surviving in a more concentrated and integrated global environment.’<sup>475</sup> They can consolidate the solidarity-based networks already existing in the informal sector to help ensure that communities can withstand and address the instabilities caused by globalisation.<sup>476</sup> Cooperatives can have both an ameliorative and a transformative function.<sup>477</sup> Cooperatives can help micro-operators organise for effective political action and to have

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<sup>470</sup> OCDC op cit (n412) 17.

<sup>471</sup> Ibid at 8.

<sup>472</sup> Smith op cit (n409) 3.

<sup>473</sup> OCDC op cit (n412) 8, citing *Cooperating Out of Poverty: The Global Campaign Against Poverty* issued jointly by the ILO and the ICA.

<sup>474</sup> Ibid.

<sup>475</sup> Torgerson, Reynolds & Gray op cit (n406) 11.

<sup>476</sup> Patrizio Bianchi ‘Cooperative and the Strength of Networks’ (2013) in Bruno Roelants (ed) *Cooperative Growth for the 21<sup>st</sup> Century* 31, available at [http://ica.coop/sites/default/files/media\\_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf](http://ica.coop/sites/default/files/media_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf), accessed on 10 July 2015.

<sup>477</sup> Ibid at 32.

a voice and the political power to demand better government-provided structures and services.<sup>478</sup> Highlighting the contribution of cooperatives to socio-economic development, the UN declared 2012 as the International Year of Cooperatives (IYC).<sup>479</sup> Building on that success, ICA developed the ‘Blueprint for a Co-operative Decade,’ which states that by 2020 the cooperative form of business will be the acknowledged leader in economic, social, and environmental sustainability, the model preferred by people, and the fastest growing form of enterprise.<sup>480</sup>

#### 4.6 Cooperative History in West Africa

The cooperative sector in Africa was introduced by colonial authorities with few, if any, institutional links with indigenous or traditional systems, such as tontines in West Africa.<sup>481</sup> A social economy model took root in many francophone countries, where groupements collectifs, association villageois, mutuelles, producer groups, and other cooperative-type of organizations were promoted.<sup>482</sup> The French opted for direct intervention in the organization and administration of local structures in West Africa, which were managed by colonial civil servants and had a large territorial base beyond the local level.<sup>483</sup> Cooperative development in West and Central Africa displayed negative path dependence in continually being tied to the export crop strategy, where cooperatives were used instrumentally in the production of crops for export on behalf of colonial state authorities, and whereby governments became the prime patron of the cooperatives.<sup>484</sup> Cooperatives in colonial Africa were ‘merely functional appendages’ of these semi-

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<sup>478</sup> Dickerson ‘Functional Understanding’ op cit (n245) 211.

<sup>479</sup> Smith op cit (n409) 24.

<sup>480</sup> Ibid.

<sup>481</sup> Develtere op cit (n464) 2.

<sup>482</sup> Ibid at 27. As distinct from the social economy model of the former French colonies, the former British colonies had a more unified or integrated cooperative structure and sector, and the British played a more indirect role in the administration of cooperatives.

<sup>483</sup> Ibid at 8. The French government passed a decree in 1910 prescribing the establishment of Native Provident Societies in French West Africa.

<sup>484</sup> Ibid at 3.

public agencies used for propagating public policy.<sup>485</sup> Members were not the owners of the cooperatives and membership was often compulsory.<sup>486</sup> Post-independence governments intensified and extended government involvement in cooperative development and reinforced this negative path by making cooperatives sub-contractors, agents, or affiliates of government controlled marketing boards.<sup>487</sup> As a result, the cooperative sector lost its voluntary character completely and became subject to political and ideological imperatives.<sup>488</sup> By the end of the twentieth century, governments and donors largely withdrew from the cooperative sector.<sup>489</sup>

#### 4.7 Challenges for Cooperatives

Statistics about African cooperatives are scarce, and the extent and the significance of the African cooperative movement is unknown.<sup>490</sup> The penetration rate (cooperative density) is estimated to be only 7 per cent of the total population, but differences among countries is significant.<sup>491</sup> One of the main reasons for the scarcity of data on cooperatives is the low participation of African cooperatives in international apex organizations.<sup>492</sup> The number of cooperatives recorded in the data may be skewed higher because of the variety of business models in the region recognised as group-based economic organisations that could be counted as cooperatives.<sup>493</sup> The impact of cooperatives on poverty reduction in Africa has not been studied systematically, but it appears that the general economic

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<sup>485</sup> Delveltere op cit (n464)11-12.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid. It is estimated that at the time of independence less than 1% of the population of the former French colonies in Africa were involved in cooperatives.

<sup>488</sup> Ibid at 14.

<sup>489</sup> Ibid at 25.

<sup>490</sup> Develtere & Pollet op cit (n454) 39, 44.

<sup>491</sup> Ibid at 45. Total population is used for potential membership because other indices are impossible to produce in most Africa countries.

<sup>492</sup> Ibid at 44.

<sup>493</sup> Develtere & Pollet op cit (n454) 42.

significance of the cooperative sector has been limited.<sup>494</sup>

The first step in the creation of a strong, autonomous cooperative sector in the economies of West Africa is overcoming the negative legacy described above. A major challenge to successful cooperative development (which the UA-CS partly addresses) has been the lack of an enabling legal and regulatory environment and supportive institutions that promote cooperatives as private sector businesses.<sup>495</sup> Another challenge is for cooperative members to remain the primary beneficiaries of group action for which they originally organised.<sup>496</sup> In addition, the multiple purposes of cooperatives – making profits, providing services, and realising meaning – are often in tension.<sup>497</sup> Another concern is the status of cooperative-like organisations that are not included in the UA-CS or cooperatives that are not formalised, since we do not want to crowd out or diminish existing institutions that are adequately serving the needs of informal sector actors. Organisations can function in accordance with the cooperative principles without being formalised as cooperatives under the UA-CS. In many instances a less formal structure may provide a more flexible and appropriate organisational form for collective action.

Cooperatives are strengthened and serve their members most effectively by working together through local, regional, national, and international structures to form a more integrated cooperative sector.<sup>498</sup> These secondary and tertiary structures (vertical and horizontal) bring greater benefits of economies of scale and leverage and better access to markets.<sup>499</sup> The importance of cooperative networks is reflected in the UA-CS articles on unions, federations, and confederations (supra 4.4). There has not been much integration in the cooperative sector in Africa, which historically has been fragmented

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<sup>494</sup> Ibid at 60, 75.

<sup>495</sup> OCDC op cit (n412) 26.

<sup>496</sup> Torgerson, Reynolds & Gray op cit (n406) 10.

<sup>497</sup> Ibid at 8.

<sup>498</sup> Bianchi op cit (n476) 32, 34.

<sup>499</sup> Develtere & Pollet op cit (n454) 46-47.

and overly dependent on outside patrons.<sup>500</sup> As a consequence, the voice of the cooperative constituency has been underrepresented.<sup>501</sup>

The UA-CS is likely subject to many of the same implementation issues plaguing OHADA as whole. However, unlike the bulk of OHADA law, the UA-CS is directly applicable to micro-operators and other actors in the informal sector. The structure and principles of cooperatives have been derived over many years from the experiences and aspirations of marginalised groups all over the world. Notwithstanding its formal requirements, the UA-CS is flexible and can accommodate the various contexts and needs of potential members. Micro-operators should be enticed to move toward formalisation as their understanding and appreciation of the benefits of formality evolve over time. It would seem the best thing would be to make formalisation optional, and not mandatory. Cooperatives complement and are reflective of traditional West African norms and institutions, and they are consistent with a human capability concept of development. Although the cooperative form is important, it is the substance of the law as embodied in the cooperative principles that is more significant. Ultimately, widespread adoption and use of the UA-CS could perform a signalling function for micro-operators throughout the regions as to the benefits of formality in conducting business.

#### 4.8 Reintegration

One aspect of modern legislative action throughout Africa, including OHADA, is an attempt to restore a measure of ‘re-integration’ in contemporary African society.<sup>502</sup> Allot describes the process of ‘dis-integration’ of African societies this way:

[T]raditional [African] societies, though in continuous evolution, were *integrated* societies. There was an intimate connection in each society between its religion, moral code, and system of thought, its social manners and conventions, its modes of economic activity, its family or social structure and its legal system. This integration was damaged, and eventually shattered, by the

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<sup>500</sup> Ibid at 47.

<sup>501</sup> Ibid at 75, 80.

<sup>502</sup> Allott, ‘African Law’ op cit (n120) 136.

arrival of colonial rule and imposition of colonial law, followed by the penetration of European ideas, activities, and institutions. This *disintegration* within the local indigenous society was repeated higher up the scale, at the territorial level: there was little or no real unity of thought or purpose between those who happened to find themselves within the same territorial boundary.<sup>503</sup>

In addition, there was a gradual abandonment of a community-centred approach to life in favour of individualism.<sup>504</sup> Writing shortly after the time of independence, Allott saw the movement towards unification of laws in Africa in optimistic terms as the expression in legal terms of this reintegration effort.<sup>505</sup> However, unification of laws was to occur in stages -- first, harmonisation, then integration, and finally unification.<sup>506</sup>

[H]armonization is . . . the reconciliation of contradictory elements between the rules and effects of two or more legal systems which continue in force as self-sufficient bodies of law. . . . [I]ntegration is . . . the making a new legal system by the combining of separate legal systems into a self-consistent whole. . . . [The combined legal systems may remain sources of law], but they cease to be self-sufficient autonomous systems. . . . [U]nification is . . . the creation of a new, uniform, legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self-sufficient systems or as bodies of rules incorporated in the larger whole . . .<sup>507</sup>

A crucial attribute of harmonisation is that it presupposes and preserves the diversity of the objects harmonised.<sup>508</sup> True harmonisation would respect the legal pluralism in the region, whereas forced unification is antithetical to pluralism. No real effort at harmonisation of laws seems to have ever been undertaken in Africa.<sup>509</sup> Legal reforms, such as OHADA, seek to unify laws without working through earlier, conciliatory stages of harmonisation and integration. Moreover, these uniform laws have been imposed from outside sources rather than developed internally. For Allot,

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<sup>503</sup> Allott 'Towards the Unification of Laws in Africa' (1965) 14 *Int'l & Comp. L.Q.* 366 at 389.

<sup>504</sup> Mancuso op cit (n113) 8.

<sup>505</sup> Allott 'Unification' op cit (n503) 389.

<sup>506</sup> Ibid at 376.

<sup>507</sup> Allott op cit (n503) 377.

<sup>508</sup> Martin Boodman 'The Myth of Harmonization of Laws' (1991) 39 *Am. J Comp. Law* 699 at 702.

<sup>509</sup> Matipé op cit (n303) 9.



it is a question of finding an alternative new law which reconciles and unifies existing laws – when they are as various as customary law on the one hand and modern commercial law on the other.<sup>510</sup> The key element in finding this alternative new law is the process itself of accommodation and reconciliation. The goal is to re-establish broken harmony through a collective process leading to reconciliation.<sup>511</sup> Integration through forced unification of laws short-circuits the necessary process of the conciliation of laws and peoples. The social and political conditions necessary for unification must first exist. Law reform should create a space where there is common ground to move toward integration, wherein different legal orders are viewed interdependently and equally.<sup>512</sup> The introduction of mediation into OHADA and the adoption of expansive corporate social responsibility norms that consider the wider community would provide a space for African norms and values to play out. Because of their solidarity and coordinative features, cooperatives, as modern commercial enterprises, would be especially useful in creating or supporting the foundational social and political institutions needed for pluralistic legal development. The UA-CS could be an important step on the path to reintegration.

One of the presumed virtues of OHADA is that it may be able to bypass the political obstacles in the region by ‘flying under the radar’ of national governments.<sup>513</sup> Given the corruption, rent-seeking, and extractive nature of many of the states in the region this impulse is understandable, but, even if this were possible, it is ultimately self-defeating to attempt it. Sustainable legal and economic development require the active participation of those for whom the law is made and for whom development is sought. Further weakening national structures through

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<sup>510</sup> Allott ‘Unification’ op cit (n503) 386.

<sup>511</sup> Vanderlinden op cit (n19) 1064.

<sup>512</sup> Mancuso op cit (n113) 14.

<sup>513</sup> Claire Moore Dickerson ‘The Future of International Law and Development: Flying Under the Radar’ (2010) 35 *N.C.J. Int’l L. & Com. Reg.* 555 at 556, 560 (‘goal is to avoid the negative impact of the interplay of politics and corruption’).

supranational rules and institutions will not help remedy the ‘democratic deficit’ that already exists in those countries.<sup>514</sup> There is also a curious, circular reasoning in the idea that OHADA can bypass national, political corruption, while at the same time asserting that the ineffectiveness of OHADA is mostly a problem of political will on the part of those same nations.<sup>515</sup> In any event, the formal law should offer means to assist in this process of conciliation of competing demands, not attempt to bypass it, as OHADA has done.

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<sup>514</sup> Deschamps ‘A Grounded Outlook’ op cit (n306) 123.

<sup>515</sup> Dickerson ‘Flying Under the Radar’ op cit (n514) 567.

## CONCLUSION

OHADA laws and institutions have not contributed to economic development and have not promoted the inclusive institutions necessary for development to occur. This is so primarily because the OHADA laws and institutions are mostly irrelevant to the economic and social life of the vast majority of the people living throughout the OHADA region. The enactment of the Uniform Act on Cooperative Societies now makes OHADA law relevant to the informal sector, at least formally, but it is too soon to know if the Act will substantively improve the overall situation. Moreover, the demand for OHADA came from domestic and foreign legal elites and not the vast majority of people – the constituents – who are subject to the laws. OHADA is fixated on codification and formalisation of laws, when what is needed is functionality and adaptability. Another fundamental problem with OHADA is that in seeking to unify all business laws in the region – by ignoring or attempting to supplant all existing practices and customary laws – the reform effort itself actually impedes development. Inclusive development requires the vitality and involvement of important pluralistic elements in society. OHADA reformers sought to eliminate legal diversity in commercial matters. What is really needed is a reconciliation of the various laws and practices related to economic activity within individual countries and throughout the region.

Some scholars are sceptical of the ability of OHADA to bring about development in West Africa, and have reservations about the amount of money spent for the benefit of a relatively small clientele.<sup>516</sup> While sharing those reservations, this paper has attempted to show some possible ways to improve the applicability and receptivity of OHADA laws more broadly and inclusively – that is, to link OHADA and the informal sector. The most promising way to make this link would be for the relevant constituents and their governments to fully embrace and support the UA-CS. As of this writing, there is insufficient data available about the state of the cooperative sector in the several years

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<sup>516</sup> Vanderlinden op cit (n19) 1070-71.

both before and after implementation of UA-CS and so more research is needed. Nevertheless, the benefits of cooperatives in enhancing development in the region and in linking OHADA with the informal sector could be significant.

Formal law must create a structure or framework – by facilitating coordinative behaviour – within which traditional or local business norms can play out and evolve. Formal laws and institutions must also respect, accommodate, and in some cases, defer to customary laws. Modern cooperatives can provide a framework for facilitating coordinative behaviour. Cooperatives and the traditional institutions of mutuality, reciprocity, and solidarity that exist throughout West Africa share many of the same values, principles, and objectives. However, the modern cooperatives form can offer improved sustainability and growth potential for its members. Cooperatives can make an important contribution to transformational and sustainable development, since collective action and mutual aid enhances the capacity and self-help agency of informal sector actors. They allow micro-enterprises to overcome various market barriers and to achieve mutual economic goals that cannot be met in isolation. By linking small-scale producers to larger markets, cooperatives can improve regional, intra-African, and even international trade. They can also provide more certainty and stability for informal sector actors. The solidarity and collective action features of cooperatives also give people a voice and a better opportunity to take charge of their destinies and to demand the laws they need.

## BIBLIOGRAPHY

### PRIMARY SOURCES

Treaties (<http://www.ohada.com/traite.html>)

Traité relatif à l'harmonisation en Afrique du droit des affaires, 17 October 1993 (4 Journal Officiel [JO] 1 November 1997).

Traité portant révision du traité relatif à l'harmonisation du droit des affaires en Afrique, 17 October 2008.

Legislation (<http://www.ohada.com/actes-uniformes.html>)

Acte uniforme portant organization des procedures collectives d'apurement du passif, adopted 10 September 2015, effective 24 December 2015 (spécial JO 25 September 2015).

Acte uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique, adopted 30 January 2014, effective 5 May 2014 (spécial JO 4 February 2014).

Acte uniforme révisé portant au droit commercial général, 15 December 2010, effective 16 May 2011 (23 JO 15 February 2011).

Acte uniforme révisé portant organisation des sûretés, adopted 15 December 2010, effective 16 May 2011 (23 JO 15 February 2011).

Acte uniforme relatif au droit des sociétés coopératives, 15 December 2010, effective 16 May 2011 (23 JO 15 February 2011).

Acte uniforme relatif aux contrats de transport des marchandises par route, adopted 22 March 2003, effect 1 January 2004 (13 JO).

Act uniforme portant organisation et harmonisation des comptabilité des entreprises, adopted 24 March 2000 (10 JO).

Acte uniforme relatif au droit de l'arbitrage, adopted 11 March 1999, effective 11 June 1999 (8 JO).

Acte uniforme portant organization des procédures simplifiées de recouvrement et des voies d'exécution, adopted 10 April 1998, effective 10 July 1998 (6 JO).

## SECONDARY SOURCES

### Books

Acemoglu, Daron and Robinson, James A. *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, (2012) Crown Business, New York.

Benjamin, Nancy and Mbaye, Ahmadou Aly *The Informal Sector in Francophone Africa: Firm Size, Productivity and Institutions* (2012) World Bank, Washington, DC.

Bouman, F.J.A. and Hospes, O. (eds) *Financial Landscapes Reconstructed: The Fine Art of Mapping Development* (1994) Westview Press: Boulder, CO, available at <http://www.w.sadhan.net/Adls/Dl4/DocumentandCaseStudiesMAin/DeliveryModelpaperonline/FinancialLands/FLR22.pdf>, accessed on 15 August 2015.

Carothers, Thomas (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie Endowment for International Peace, Washington, DC.

Cissé, Hassane, Muller, Sam, Thomas, Chantal, and Wang, Chenguang (eds) *The World Bank Legal Review, Volume 4: Legal Innovation and Empowerment for Development* (2013) World Bank, Washington, DC. available at <https://openknowledge.worldbank.org/bitstream/handle/10986/12229/NonAsciiFileName0.pdf?sequence=1&isAllowed=y>. accessed on 18 February 2015.

Coase, R.H., *The Firm, the Market, and the Law* (1988) The University of Chicago Press, Chicago.

Cracogna, Dante, Fici, Antonio, Henrÿ, Hagen, *International Handbook of Cooperative Law*, (2013) Springer-Verlag, Berlin Heidelberg, available at <http://link.springer.com/book/10.1007%2F978-3-642-30129-2>.

Develtere, Patrick, Pollet, Ignace and Wanyama, Fredrick (eds) *Cooperating Out of Poverty: The Renaissance of the African Cooperative Movement* (2008) ILO, Geneva.

Dickerson, Claire Moore (ed) *Unified Business Laws for Africa: Common Law Perspectives on OHADA* 2ed (2012) IEDP, London.

Duncan, J. and Derrett, M. (eds) *An Introduction to Legal Systems* (1968) Sweet & Maxwell, London.

Fenrich, Jeanmarie, Galizzi, Paolo, Higgins, Tracy E. (eds) *The Future of African Customary Law* (2011) Cambridge University Press, Cambridge.

Guha-Khasnobis, Basudeb; Kanbur, Ravi; Ostrom, Elinor (eds) *Linking the Formal and Informal Economy: Concepts and Policies* (2006) UNU-WIDER Studies in Development Economics, Oxford University Press, Oxford.

Hatchard, John and Perry-Kessaris, Amanda (eds) *Law and Development: Facing Complexity in the 21<sup>st</sup> Century: Essays in Honor of Peter Slinn* (2003) Cavendish, London.

King, Kenneth and McGrath, Simon (eds) *Enterprise in Africa: Between Poverty and Growth* (1999) Centre for African Studies, Intermediate Technology Publications, London.

Linnan, David K. (ed) *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (2012) Ashgate, Surrey.

Madolo, Nokuhle (ed) *International Economic Law – The Voices of Africa* (2012) Mandela Institute, SiberInk, Cape Town.

Martor, Boris; Pilkington, Nanette; Sellers, David S.; and Thouvenot, Sebastien *Business Law in Africa: OHADA and the Harmonization Process* (2002) Eversheds/ Kogan Page, London.

North, Douglass C., *Institutions, Institutional Change and Economic Performance* (1990) Cambridge University Press, New York.

Padayachee, Vishnu (ed) *The Political Economy of Africa* (2010) Routledge, London.

Paquin, Julie *Legal Reforms and Business Contracts in Developing Countries: Trust, Culture, and Law in Dakar* (2012) Ashgate, Surrey.

Skinner, Elliott P. (ed) *Peoples and Cultures of Africa: An Anthropological Reader* (1973) Doubleday/Natural History Press, Garden City, NY.

Sumner, Colin (ed) *Crime, Justice and Underdevelopment* (1982) Heinemann, London.

Trubeck, David M. and Santos, Alvaros (eds) *The New Law and Economic Development: A Critical Appraisal* (2006) Cambridge University Press, New York.

World Bank (2006). *World Bank Legal Review: Law, Equity, and Development, Volume 2* World Bank and Martinus Nijhof. Washington, DC available at <https://openknowledge.worldbank.org/handle/10986/6899>, accessed on 10 July 2015.

### Journals

Allott, A.N. 'Towards the Unification of Laws in Africa' (1965) 14 *Int'l & Comp. L.Q.* 366 (1965)

Allott, Antony N. 'Development for What? – False Gods and Holy Writ' (1984) 3 *Third World Legal Stud.* 1.

Bamodu, Gbenga 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa' (1994) 38(2) *J. Afr. L.* 125.

Boodman, Martin 'The Myth of Harmonization of Laws' (1991) 39 *Am. J. Comp. Law* 699.

Crocker, D. 'Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic' (1992) 20 *Political Theory* 584.

Cross, Frank B. 'Law and Economic Growth' (2002) 80 *Texas Law Review* 1737.

Davis, Kevin E. and Trebilcock, Michael J. 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 *Am. J. Comp. L.* 895.

Deschamps, Isabelle 'Assessing the *Organisation pour l'harmonisation en Afrique du droit des affaires*'s Contributions to Poverty Reduction in Africa: A Grounded Outlook' (2013) 6(2) *Law and Development Review* 111.

Diawara, Karounga and Lavallée, Sophie 'Corporate Social Responsibility (CSR) in the OHADA Law' (2014) 2(2) *Journal of Business Law and Ethics* 39.

Dickerson, Claire Moore 'Bringing Formal Business Laws to Cameroon's Informal Sector: Lessons and Cautions from the Tax Law Example' (2014) 13 *Wash. U. Global Stud. L. Rev* 265 available at [http://openscholarship.wustl.edu/law\\_globalstudies/vol13/iss2/6](http://openscholarship.wustl.edu/law_globalstudies/vol13/iss2/6), accessed on 25 July 2014.

Dickerson, Claire Moore 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2006) 44 *Colum. J. Transnat'l L.* 17.

Dickerson, Claire Moore 'OHADA on the Ground: Harmonizing Business Laws in Three Dimensions' (2010) 25 *Tul. Eur. & Civ. L.F.* 103.

Dickerson, Claire Moore 'The Future of International Law and Development: Flying Under the Radar' (2010) 35 *N.C.J. Int'l L. & Com. Reg.* 555.

Dickerson, Claire Moore 'Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law' (2011) 59 *Am. J. Comp. L.* 179.



Fafchamps, Marcel 'Networks, Communities, and Markets in Sub-Saharan African' (2001) 10 *Journal of African Economies*, AERC Suppl 2 109.

Fombad, Charles Manga 'Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond' (2013) 59(3) *Africa Today* 51.

Glenn, H. Patrick 'Sustainable Diversity in Law' (2011) 3 *HJRL* 39.

Hansmann, Henry 'Cooperative Firms in Theory and Practice' *LTA* 4/99 available at <http://www.law.yale.edu/documents/pdf/Faculty/Hansmanncooperativefirms.pdf>, accessed on 10 September 2015.

Hiez, David and Men  trety, S  verine 'Toward an Elaboration of a More Pluralistic Legal Landscape for Developing West African Countries: Organization for the Harmonization of Business Law in Africa (OHADA) and Law and Development' (2015) 8(2) *Law and Development Review* 433.

Luiz, John M. 'The Wealth of Some and the Poverty of Sub Saharan Africa' (2006) 33(9) *International Journal of Social Economics* 625.

Lyons, Michal 'Pro-Poor Business Law? On MKURABITA and the Legal Empowerment of Tanzania's Street Vendors' (2013) 5 *HJRL* 74.

Mancuso, Salvatore 'OHADA Report' (2012) 1 *European Review of Private Law* 169.

Mancuso, Salvatore 'African Law in Action' (2014) 58 *Journal of African Law* 1.

Meagher, Kate, 'Social Capital, Social Liabilities, and Political Capital: Social Networks and Informal Manufacturing in Nigeria,' (2006) 105 (421) *African Affairs* 553.

McKeever, Kent 'A Short History of Tontines' (2009) 15 *Fordham Journal of Corporate and Financial Law* 491.

Milhaupt, Curtis J. 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy – Implications for Policy' (2009) 57 *Am. J. Comp. L.* 831.

Perry, Amanda, 'Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence' (2000) 49 *Int'l & Comp. L.Q.* 779.

Pistor, Katharina 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *Am. J. Comp. L.* 97.

Prado, Mariana and Trebilcock, Michael 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59 *U. Toronto L.J.* 341.

Sacco, Rudolfo 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *Am. J. Comp. L.* 1.

Tamanaha, Brian Z. 'The Primacy of Society and the Failures of Law and Development' (2011) 44 *Cornell Int'l L.J.* 209.

Tamanaha, Brian Z. 'The Rule of Law and Legal Pluralism in Development' (2011) 3 *HJRL* 1.

Torgerson, Randall E., Reynolds, Bruce J. & Gray, Thomas W. 'Evolution of Cooperative Thought, Theory, and Purpose' (1998) 13 *Journal of Cooperatives* 1.

Vanderlinden, Jacques 'What Kind of Law Making in a Global World? The Case of Africa' (2007) 67 *La. L. Rev.* 1043.

### Papers and Reports

Balkenhol, Bernd and Gueye, E.H. 'Tontines and the Banking System – Is There a Case for Building Linkages' Working Paper NE 2, Enterprise and Cooperative Development Department, ILO (1992) ILO, Geneva, available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/documents/publication/wcms\\_118281.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_118281.pdf), accessed on 15 July 2015.

Beauchard, Renaud and Kodo, Mahutodji Jimmy Vital. *Can OHADA Increase Legal Certainty in Africa?* (2011) Justice & Development Working Paper Series, World Bank, Washington, DC available at <http://documents.worldbank.org/curated/en/266761467990085419/Can-OHADA-increase-legal-certainty-in-Africa>, accessed on 10 February 2015.

Chen, Martha Alter *The Informal Economy: Definitions, Theories and Policies* (2012) WIEGO Working Paper No. 1, Woman in Informal Employment: Globalizing and Organizing, Cambridge, MA (2012) available at [http://wiego.org/sites/wiego.org/files/publications/files/Chen\\_WIEGO\\_WP1.pdf](http://wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf).

Hevener, Christy Chung 'Alternative Financial Vehicles: Rotating Savings and Credit Associations (ROSCAs)' (2006) Discussion Papers, Community Affairs Department, Federal Reserve Bank of Philadelphia, available at <http://www.phil.frb.org/community-development/publications/discussion-papers/discussionpaper-ROSCAs.pdf>, accessed on 20 June 2015.

Hiez, David and Tadjudje, Willy 'Presentation of the New OHADA Law on Cooperatives' (2012) available at [http://www.recma.org/sites/default/files/new\\_ohada\\_cooperative\\_law.pdf](http://www.recma.org/sites/default/files/new_ohada_cooperative_law.pdf), accessed on 10 September 2015.

International Labour Office *Women and Men in the Informal Economy: A Statistical Picture Second Edition* (2013) ILO, Geneva, available at

[http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms\\_234413.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf), accessed on 10 September 2015.

International Labour Office, Report of the Seventeenth International Conference of Labour Statisticians (2003) ILO, Geneva, available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms\\_087585.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_087585.pdf), accessed on 15 July 2015.

International Labour Office, 'Resolution Concerning Statistics of Employment in the Informal Sector' *Report of the Fifteenth International Conference of Labour Statisticians* (1993) ILO, Geneva, available at [http://www.ilo.org/public/libdoc/ilo/1993/93B09\\_65\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1993/93B09_65_engl.pdf), accessed on 15 July 2015.

Roelants, Bruno (ed) *Cooperative Growth for the 21<sup>st</sup> Century* (2013) International Cooperative Alliance, Brussels, available at [http://ica.coop/sites/default/files/media\\_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf](http://ica.coop/sites/default/files/media_items/Cooperative%20Growth%20for%20the%2021st%20century.pdf), accessed on 10 July 2015.

Smith, Stirling *Promoting Cooperatives: An Information Guide to ILO Recommendation No. 193* (2014) ILO, Geneva, available at <http://www.ilo.org/publns;978-92-2-128972-2>, accessed on 10 September 2015.

Tiemann, Alexa *OHADA Membership and Business Reforms: A Driver for Growth?* (2012), Working Paper, University of St. Gallen, available at [http://colloquedial.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146\\_US\\_Tiemann.pdf](http://colloquedial.dauphine.fr/fileadmin/mediatheque/dial2013/documents/Papers/146_US_Tiemann.pdf) accessed on 10 July 2015.

U.S. Overseas Cooperative Development Council *Cooperatives: Pathways to Economic, Democratic and Social Development in the Global Economy* (2007) OCDC, Arlington, VA, available at [http://www.ocdc.coop/pdf/coop\\_pathways\\_report.pdf](http://www.ocdc.coop/pdf/coop_pathways_report.pdf), accessed on 15 July 2015.

World Bank 'Doing Business 2016: Measuring Regulatory Quality and Efficiency' (2016) World Bank, Washington, DC, available at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>, accessed on 13 April 2016.

Verick, Sher 'The Impact of Globalization on the Informal Sector in Africa' (20006) Economic and Social Policy Division, UN Economic Commission for Africa and Institute for the Study of Labor, available at [http://www.iza.org/conference\\_files/worldb2006/verick\\_s872.pdf](http://www.iza.org/conference_files/worldb2006/verick_s872.pdf), accessed on 10 March 2015.